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Towards a Theory of Variable Personality:
A Study with reference to the Palestinian Situation

by

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ABSTRACT

This thesis is primarily concerned with the question of personality in international law. In order to assess personality the vehicles of the Palestinian situation and representation of Palestinians in the West Bank and Gaza Strip are used. Therefore at points in the study each dominates in order to further the overall thesis.

The study looks beyond the jaded constitutive/declaratory debate regarding recognition and personality and examines recent state practice, which sheds further light on the issue. A flexible approach to personality is taken and it is asserted that the best description of the process of recognition and achievement of status for both emerging states and representative groups is that an entity's status can be variable: variable in an evolutionary sense, in relation to the range of responses which the international community may have and also in relation to status on the international stage. Thus an entity may operate with different degrees of status at any one point in time depending on with whom and what circumstances are in question.

This theory is then examined in relation to the Palestinian situation. The progression of the Palestinian Liberation Organisation and the Palestinian Authority on the world stage is investigated through, *inter alia*, their relationships with other states and international organisations. The variability theory asserted above appears to be borne out in the Palestinian context which leads on to questions of what broader implications this may have for other areas of international law.

Two subject areas are then discussed in relation to the implications of the theory of variable personality. First, the concept of responsibility which has traditionally been adopted in relation to states rather than other entities on the international stage. Second, the protection of the rights of those placed under the jurisdiction of an entity with variable levels of personality, noting that this is also an issue which is generally dealt with at a state level. In each examination the Palestinian situation is drawn upon to provide concrete examples of the possible problems which may arise for other areas of international law due to the theory of variable personality. Examples of ways in which those issues could be reconciled are also considered. Lastly, both subject areas provide further important conclusions in relation to the assertion that personality may be variable.

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This work is dedicated to my Grandmothers – Dora and Joyce.

AUTHOR'S DECLARATION

I declare that the work contained in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original except where indicated by special reference in the text and no part of the dissertation has been submitted for any other degree.

Any views expressed in the dissertation are those of the author and in no way represent those of the University of Bristol.

This dissertation has not been presented to any other University for examination either in the United Kingdom or overseas.

Signed: 

Date: 10th November 2001

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LIST OF ABBREVIATIONS

AC	Appeal Cases
AD	Annual Digest of Public International Law
All ER	All England Law Reports
AJIL	American Journal of International Law
Arizona JICL	Arizona Journal of International and Comparative Law
BUILJ	Boston University International Law Journal
BYBIL	British Yearbook of International Law
Can. YBIL	Canadian Yearbook of International Law
CWRJIL	Case Western Reserve Journal of International Law
Col. JTL	Columbia Journal of Transnational Law
Cornell ILJ	Cornell International Law Journal
Denver JILP	Denver Journal of International Law and Policy
DOP	Israel/PLO Declaration of Principles
Emory ILR	Emory International Law Review
EJIL	European Journal of International Law
GAOR	General Assembly Official Records
Hague Receuil	Receuil de Cours de l'Academie de Droit International
HILJ	Harvard International Law Journal
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
Ind. JIL	Indian Journal of International Law
ICLQ	International and Comparative Law Quarterly
ICJ Rep.	International Court of Justice Reports

Int. Aff.	International Affairs
Int. Org.	International Organisation
Int. HR Rep.	International Human Rights Reports
ILM	International Legal Materials
ILR	International Law Reports
Iran-US CTR	Iran – United States Claims Tribunal Reports
Is. LR	Israel Law Review
Is. YHR	Israeli Yearbook on Human Rights
It. YBIL	Italian Yearbook of International Law
JDI	Journal du Droit International
JMAS	Journal of Modern African Studies
Jnl. Peace Res.	Journal of Peace Research
LQR	Law Quarterly Review
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
Leiden ILJ	Leiden International Law Journal
Liverpool LR	Liverpool Law Review
Melbourne JIL	Melbourne Journal of International Law
MEI	Middle East International
Mich. JIL	Michigan Journal of International Law
NLM	National Liberation Movement
NYUJILP	New York University Journal of International Law and Politics
OAU	Organisation of African Unity
Pal. YBIL	Palestine Yearbook of International Law
PA	Palestinian Authority

PLO	Palestinian Liberation Organisation
PCIJ Rep.	Permanent Court of International Justice Reports
Proc. ASIL	Proceedings of the American Society of International Law
QB	Queen's Bench Division Law Reports
RIAA	United Nations Reports of International Arbitral Awards
Rev. Int. Aff.	Review of International Affairs
Rev. Int. Comm. Jur.	Review of the International Commission of Jurists
Seattle ULR	Seattle University Law Review
SCOR	Security Council Official Records
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stanford LR	Stanford Law Review
UKMIL	United Kingdom Materials on International Law
UKTS	United Kingdom Treaty Series
UN	United Nations
UN Jur. YB	United Nations Juridical Yearbook
UNTS	United Nations Treaty Series
U New South Wales LR	University of New South Wales Law Review
Virg. JIL	Virginia Journal of International Law
WLR	Weekly Law Reports
YBILC	Yearbook of the International Law Commission
Yale LJ	Yale Law Journal
YJWPO	Yale Journal of World Public Order
YSWPO	Yale Studies in World Public Order

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INTRODUCTION

International legal personality and the norms which govern its attainment are perhaps the most important issues with which international lawyers must grapple. The status which an entity is considered to have can affect its relationships with other actors on the international stage and the extent to which it is able to operate within the international community. Therefore, some degree of international legal personality is vital if an entity intends to function at an international level. How this personality is achieved however has been the subject of much legal debate.[1]

The aim of this study is to further this debate and bring new evidence to light regarding the way in which the international community treats entities which seek to act on the international stage. This involves a reappraisal of the question of personality in international law in the light of recent state practice in the area. This is achieved by using the vehicle of a case study - that of the Palestinian situation. The richness of the practice in the Palestinian context enables the theory behind personality to be placed under the microscope and questioned. If the current theories regarding international law and personality are found to be wanting, this could have important consequences for other areas of international law.

In order to address these issues this thesis is split into two parts. Part I looks at personality in both international law in general and also in the Palestinian context and Part II considers the consequences of those findings, again using the Palestinian situation as a case study. It is hoped that these assessments will have three main uses in terms of international law.

First, it will assimilate recent and important state practice in terms of personality and recognition and will enable a reassessment of international law in that area to take place.

[1] See Chapter One which deals with current and past legal thinking regarding the attainment of international legal personality.

Second and as a corollary of the study on personality, it will provide a useful study as to the status of Palestine and the representatives of the Palestinian people in the West Bank and Gaza Strip.

Third, in the light of the two previous points it will be possible to consider the implications of the reappraisal on personality for other areas of international law. This may shed light on some of the main challenges for international law in general and also in the Palestinian situation.

Due to these two different areas of concern, international legal personality and the Palestinian situation, there are occasions when each becomes prevalent in the discussion. The thesis is primarily about personality, but given that a case study of Palestine is used to present some of the ideas contained within this work, it forms a major part of the debate and at times conclusions may emerge regarding the Palestinian situation, as a by product of the questions raised in relation to personality.

There are a few terms which are used which should be clarified at the outset. The term "Palestinian" people is generally used to describe only those Palestinians living within the West Bank and Gaza Strip. Often, however, the phrase, "Palestinians in the West Bank and Gaza Strip" is used simply to reinforce the definition. The main exception to this is that in Chapter Two, where the history of Palestine is considered, the term "Palestinian" is sometimes used to describe all Palestinians – those in the Diaspora, those living in Israel and those in the West Bank and Gaza Strip since until after the 1967 Israel/Arab war the West Bank and Gaza Strip were not occupied by Israel.

The designation PLO is used to refer to the Palestinian Liberation Organisation which represents all Palestinians (in its widest sense).[2] The designation PA is used to refer to the Palestinian Authority which is the domestic body and form of interim government for Palestinians living within the West Bank and Gaza Strip.[3] On some occasions it is necessary to refer to the overall representation of all Palestinians at both an international and domestic level in which case the term "Palestinian Representation" is used and should be taken to include both the PLO and the PA.

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[2] See Appendix I for PLO organisation chart.
[3] See Appendix I for PA organisation chart.

INTRODUCTION TO PART I

The first part of this thesis aims to examine the nature of personality in international law. Part I is split into three chapters to clarify the different issues which need to be raised to consider the overall question of personality.

Chapter One seeks to provide a theoretical backdrop to the question of personality and does not involve a consideration of the Palestinian situation. It is important to ground this study by examining how far the debate on personality has travelled before considering how the occurrences in the Palestinian situation may affect this area of international law. Three main issues are dealt with in Chapter One in order to build a picture of personality in modern international society. First, the nature of personality and the role of recognition in questions of status are considered. Second, the range of responses the international community has had to some specific examples of non-state groups which have made a claim to status in international law are examined. Lastly the issue of self determination in relation to claims to status by non-state groups will be brought into the discussion. This discussion will aim to answer questions regarding the link between recognition and the achievement of status by entities making a claim to act on the international stage. It is hoped that the discussion will provide an understanding of these issues which can then be built upon in the rest of the thesis.

Once these primary issues have been considered and the theory of personality on which this thesis is grounded have been fully debated, the study moves on to consider how the Palestinian situation can be instructive in questions of personality. Since the Palestinian situation is extremely complicated, Chapter Two provides an account of the historical and political story behind the current Palestinian claims to statehood. The chapter also examines the question of whether the Palestinians in the West Bank and Gaza Strip have a right to self determination.

Chapter Three is the chapter upon which a major part of this thesis rests. It builds upon the work carried out in chapters one and two by looking at the response of the international community to the claims of the Palestinian representation to act upon the international stage. Both collective action and the responses of individual states are

considered. These responses are assessed in the light of the theory behind personality which has been asserted in Chapter One.

Chapter Three and its conclusions are important for two reasons. First, they assist in the reappraisal of the law governing personality as they will either support or contradict the assertions made in Chapter One regarding international legal personality. Second, they can independently provide an assessment of the level of status which the Palestinian Representations claims to statehood have achieved.

Once these conclusions regarding personality have been reached it will be possible to then begin to consider the consequences of such determinations. This will be carried out in Part II of this thesis in relation to specified areas of international law.

CHAPTER 1

PERSONALITY IN INTERNATIONAL LAW

INTRODUCTION

This chapter seeks to provide a theoretical backdrop to the issue of personality in international law. This will be done using international law case studies and theories. Although the Palestinian question is the main case study used in this reappraisal of the law of personality, it will not be considered until Chapters Two and Three.[1] It will provide the vehicle by which to analyse personality in international law. However, this first chapter is vital since it is impossible to analyse the way in which the Palestinian Representation has been treated by the international community without first understanding the way in which the international community reacts to claims to status in general and also to non-state groups which make claims to status. Later in the thesis (after the status of the Palestinian Representation has been considered), it may be possible to draw comparisons and note issues which may aid in understanding the nature of personality and international law more clearly and enable these conclusions to be applied to other distinct areas of international law.

In order to achieve this, Chapter One focuses on three main questions. First, the nature of personality and the role of recognition in questions of status. Second, the range of responses the international community has had to some specific examples of non-state

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[1] Chapter Two looks at the background to the Palestinian situation in order to place the thesis in political and historical context and Chapter Three examines the international legal status of the Palestinian Representation. The term "Palestinians" in this thesis can be taken to include only those Palestinians living within the West Bank and Gaza Strip. It is accepted that there are people of Palestinian origin who would class themselves as Palestinian living in Israel, in other parts of the Middle East and indeed the rest of the World. However, the Diaspora and the questions surrounding the rights of those Palestinians to return to Palestine, should a fully fledged Palestinian state emerge, are not considered here. This topic has been considered by other writers. See for example, Dimitrijevic, "Legal Position of Palestinian Refugees" (1968) 19 *Rev. Int. Aff.* 427; Radley, "The Palestinian Refugees: The Right to Return in International Law" (1978) 72(3) *AJIL* 586 and Quigley, "Displaced Palestinians and a Right of Return" (1998) 39 *HILJ* 171.

It should be noted that the referencing system used in this study for books and articles is to provide a full reference on the first occasion they are used. For subsequent mention of books: the author, title (or shortened version of the title) plus page reference (if required) is provided. For subsequent mention of articles: the author, article title and specific page reference (if required) is provided. All sources are listed in the bibliography.

groups which have made a claim to status in international law. Third, the issue of self determination in relation to claims to status by non-state groups is considered.

This will provide an understanding of the link between recognition and the achievement of personality. This understanding will help in the examination of claims of non-state groups to act on the international stage.

The assertions made in this chapter should provide the tools which enable Palestinian status to be examined in Chapter Three. By looking at the issue of personality and recognition in international law it will be possible to evaluate different responses within the international community to the Palestinian Representation. The consideration of the international community's response to other non-state groups will allow comparisons regarding the level of status and manner of recognition to be drawn between the Palestinian Representation and other groups. Lastly, in the light of the consideration of the importance of self determination in claims to status by non-state groups which is provided in this chapter, later in the thesis the Palestinian's claim to self determination will be examined.[2]

[2] This will occur primarily in Chapter Two, although the conclusions drawn are of great significance for Chapter Three.

1: THE NATURE OF PERSONALITY IN INTERNATIONAL LAW

The status of an entity can be described as its international legal personality. Questions of status are very important to determine since international legal personality has been defined as "the capacity to be the bearer of rights and duties under international law."[3] In other words, questions of status cannot be considered in a theoretical vacuum because they have an effect on the rights or duties which the entity possesses in reality.

It is important to understand how personality in international law is created and also to understand how personality may vary from actor to actor. This part of the chapter aims to address these points and looks at the value of recognition and its role in creating personality.

Every entity in the international community is prone to change because of the political context within which it must operate. Each body which functions in international society and interacts with other entities cannot escape being affected by the actions of other states, organisations or groups.

As a result of interacting with other entities on the international plane, the ability of an entity to interact with others may shrink or grow. A state, for example, may become more or less powerful which may have a bearing on its influence at an international level.[4]

This study aims to provide an approach to international legal personality which allows for the status of the body to reflect any changes the body experiences as it evolves and is enabled to take on different tasks. This is not to say that a State would loose its formal status simply because of political whim. However the extent to which it can influence others or act on the international stage may change according to international will. Thus the status of non-state groups must also be understood in the light of the

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[3] Schwarzenberger, *A Manual of International Law* (London: Milton Professional Books) (1976), at 53, cited in Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press) (1979), at 25.

[4] The five permanent members of the Security Council are a prime example here. It is often argued that the power balance which existed immediately post World War II and has now changed considerably, should give way to reform of the institutions of the UN, such as the Security Council because its membership has not evolved alongside the changing roles of the permanent members in international society. See, D. Archibugi, "The Reform of the UN and Cosmopolitan Democracy: A Critical Review", (1993) 30(3) *Jnl. Peace Res.* 301.

changing international scene regarding participation in the international community.[5] The increasing number of different types of actors on the international stage and the changes in international life were noted in the *Reparations Case:*

> "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the Community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of States has already given rise to instances of action upon the international plane by certain entities which are not States."[6]

A more flexible approach to participation on the international plane in practice will arguably be the main facilitator assisting the eventual realisation of the ideals of a non-state group which makes a claim to status.

Traditionally states have been the primary actors on the international stage and have governed and created international doctrine.[7] However even though the nature of sovereignty is changing and the circle of participants in the international community is growing, the role of the state is still vital and to some groups, desirable:

> "The Sovereign State is still widely perceived as both the main instrument for implementing such newly established rules and the main body to be held internationally accountable for their observance. Moreover, few international law rules can evolve without the ultimate consent of states. Furthermore the current wave of self determination movements evident in the former socialist countries (former Yugoslavia, former Czechoslovakia, Chechnya), industrialised countries (Scotland, Quebec, Catalonia) and developing countries, (Eritrea, Palestine, Indonesian provinces) is grounded in a desire for greater autonomy or ultimately even the establishment of a sovereign state. Evidently, being (or having) a state still matters."[8]

Therefore, whilst the state still is the primary subject of international law it can be said that in recent times this has begun to change and entities other than states are playing a more significant role in world affairs. For example, it is not unusual to suggest that individuals are holders of limited international rights and therefore also have a claim to international status, albeit a restricted one.[9] International organisations have also played

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[5] See Schrijver, "The Changing Nature of State Sovereignty" (1999) 70 *BYBIL* 65, at 81 - 83 for discussion regarding the "growing circle of participants in law".

[6] Reparation for Injuries Suffered in the Service of the United Nations (1949) *ICJ Rep.* 174, at 178.

[7] See also Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press) (5th Ed.: 1998), at 58.

[8] Schrijver, "The Changing Nature of State Sovereignty", at 65 – 66. Schrijver submits that the nature of statehood is qualitatively different from how it was viewed post Peace of Westphalia because of arms control and disarmament; management of the environment; foreign investment and peace and security.

[9] Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (Cambridge: Cambridge University Press) (1995), at 166. Even before the human rights movement grew in strength it was possible to argue effectively that the individual was under certain obligations imposed by international law and that disregard for such could entail punishment. For example, see the discussion as to piracy in Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell) (5th Ed.: 1998), at 432 - 433 and Rubin,

an increasingly important part on the international stage and as such, some organisations are considered to be subjects of international law in their own right.[10] Importantly for this study, groups claiming status on behalf of a people have begun to play a part in international life before their claim to full statehood is realised.[11]

Although the scope for recognition of non-state actors has broadened in recent times, the success of the claims to participate by non-state groups can vary enormously from group to group and it should be questioned why this is the case. [12] This will be discussed in parts 2 and 3 of this chapter.

In order to make determinations about status it is vital to understand how international legal personality is created.[13] This involves looking at the value of recognition and examining the constitutive and declaratory theories of recognition so that it may be established which is the better description of the law. Following this some recent state practice from the Balkans, the Baltic States and the Former Soviet Union will also be considered. This may help to shed light on the role that politics plays in recognition decisions.

Although later in section 2 non-state groups' claims to status will be examined, this part of the chapter considers the issues surrounding recognition in general so that a broad picture of the nature of personality may emerge. Indeed, the value of recognition must be the same whatever the style of entity being recognised.[14]

Ethics and Authority in International Law (Cambridge: Cambridge University Press) (1997), at 59 - 61; "Judgment of the Nuremberg International Military Tribunal, 1946" (1947) 41 *AJIL* 172; Convention on the Prevention and Punishment of the Crime of Genocide 1948, *UKTS* 58 (1970), Cmnd. 4421, *UNTS* 277, (1951) *AJIL* Supp. 6; Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to Security Council Resolution 827, (1993) 32 *ILM* 1203, (1993) 2 *Int. HR Rep.* 510; Article 25 of The Rome Statute of the International Criminal Court - Adopted by the United Nations Diplomatic Conference on an International Criminal Court on 17 July 1998.

[10] See for example, Reparations for Injuries Suffered in the Service of the United Nations (1949) *ICJ Rep.* 174. For a more in depth discussion see, Brownlie, *Principles of Public International Law* (5th Ed.), at 677 – 702; Chapter 2 of White, *The Law of International Organisations* (Manchester: Manchester University Press) (1996); Chapter 15 of Sands & Klein (Eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell) (5th Ed.:2001) and Seyersted, "International Personality of International Organisations: Do their Capacities Really Depend Upon Their Constitutions?" (1964) 4 *Ind. JIL* 1.

[11] See section 2 below.

[12] Kassim, "The Palestine Liberation Organisation's Claim to Status: A Juridical Analysis Under International Law" (1980) *Denver JILP* 1, at 4.

[13] Chapter Three examines the status of the PLO and the PA in order to shed further light on international legal personality.

[14] Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press) (1947), at 87.

1.1: What role does recognition play in questions of status?

An entity which becomes an actor on the international stage evolves and changes over time. As part of this evolution the roles it plays in the international community change alongside it. This is true of both its own internal development and the relationships which it forges with the rest of the actors in the world. Even if an entity itself does not alter dramatically, political changes on a daily basis in the international community within which it operates will affect the relationships it has.

International society is governed by many complex political forces which may work both for and against an entity making a claim to status and these undoubtedly play a role in its evolution. The question to be asked then is how much the political atmosphere in international society affects the role an entity has to play? This can only be tackled through an examination of how those claiming status become actors on the international stage. In order to attempt this, a discussion as to the different theoretical schools of thought regarding the nature of recognition in international law is required.[15]

1.1.1: The evolutionary nature of personality

It should be said at the outset that such a discussion must be viewed from a practical perspective. This means taking into account the evolutionary nature of personality in the international community which was touched on above. Since personality is not static, an actor may not necessarily be created overnight simply through recognition. Emerging entities may be described as being in a "transitional period"[16] after they or their representatives have received a limited degree of recognition. In many circumstances this "transitional period" will end with full statehood, if that is the aim of the group concerned.[17] Often, as in the cases of the disintegration of the Soviet Union, once the process has begun then it is almost certainly going to end in independence. The difference between the transitional period for each entity which receives a

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[15] See section 1.2 below.

[16] Müllerson uses this term to describe the situation that Estonia and Lativia were in after having signed a Treaty with Russia regarding their future relationship but before they had declared independence: Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London: Routledge) (1994), at 120.

[17] Although not in all cases, particularly if there is lack of international recognition or support. For example, in 1967 Biafra (which formed the Eastern part of Nigeria) declared its independence. It received recognition from only five states (Gabon, Haiti, Ivory Coast, Tanzania and Zambia). Its war of

reasonable amount of recognition and the next can often be simply a question of length of time. In a clear cut situation where the representative group and the administering state or state from which it secedes (for example) and also the international community are keen for independence to be achieved as quickly as possible and there are no competing claims to the territory, there is no reason why independence should not occur speedily. However, it is in more politically complex situations that the transitional period may be longer and independence may be harder to achieve without struggle. Therefore, in any classically difficult situation where they may be two or more claims to the territory and/or other historical, ethnic, political or religious claims to the area, recognition is important because it can help determine the length of the transitional period. The situation may be more complex and support may be given or withheld through the process of recognition in cases where there is a claim which breaks up an existing functioning entity. In such cases the transition to statehood may be less inevitable.

It should also be noted that the theory that personality can be evolutionary does not necessarily only apply to states or those claiming statehood. As mentioned above, it is certain that an international organisation may have a degree of personality in international law.[18] Indeed, international organisations are a good example of the kind of entity whose personality and capacity to participate in international life may evolve and change over a period of time. The development of the personality of the European Union and European Communities can be said to be a classic example of this. Obviously such evolution does not result in statehood, as statehood itself is not claimed, even though an organisation may at times act on behalf of its member states.[19] As the organisation has grown, taken on more functions and expanded its areas of competence (through for example the Maastrict Treaty on European Union in February 1992 or the

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liberation with Nigeria was unsuccessful and surrendered to Nigeria in January 1970, when it conceded that it would remain part of Nigeria. (See Ijalaye, "Was Biafra a State?" (1971) 65 *AJIL* 551).

[18] See footnote 10 above.

[19] Kerr LJ stated, "There can be no doubt that the EEC has legal personality in international law...there is equally no doubt that the EEC exercises power and functions which are analogous to those of sovereign states." (See McClaine Watson v Department of Trade and Industry: International Tin Council Case (1989) Ch 72 Court of Appeal). The European Court of Justice has also reaffirmed the legal personality of the EC as separate from that of its member states in ruling as to the *ultra vires* nature of Commission action, (French Republic v Commission of the European Communities C – 327/91. See also Bray (Ed.), *Constitutional Law of the EU* (London: Sweet & Maxwell) (1999), 611 ff and Tsebelis and Garrett, "The Institutional Foundations of Intergovernmentalism and Supranationalism in the EU" (2001) 55(2) *International Organisation* 357.

Amsterdam Treaty of October 1997) so too has its personality on the international stage evolved.[20]

"In their terse statement that 'the Community shall have legal personality' (EEC Treaty, Article 210) the founder states unequivocally created a new international entity independent of its component parts and endowed it with the status and attributes of a legal person"[21]

The fact that the organisation of the Communities and Union is unlike other such organisations and has changed over times means that,

"There is much discussion about the nature of the entity into which the Community/Union is evolving. Although not a state, the Community (and to a lesser extent, the Union) possesses an institutional and constitutional sophistication which marks it out from normal intergovernmental associations...So the Community/Union may not be a State, but it displays some State-like features and it affects the nature of the States that are members of it."[22]

The personality of entities such as the European Communities and Union is also arguably dependent on the prevailing political winds and the will of states since personality to a degree,

"...depends on whether the Community/Union institutions are strengthened at the expense of sovereignty or whether the sovereign element keeps the institutions in the servile role of functional bureaucracy."[23]

Therefore the concept that personality may be evolutionary can exist in relation to all different kinds of actors. However, in relation in particular to entities making a claim to statehood the classic views of personality and its attainment are less flexible and do not necessarily include allowance for a transitional period. In order to consider this in more detail it is those which are now turned to for discussion. This will enable examination of the extent of the influence they have on the international legal personality of representative groups.

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[20] Treaty on European Union (Maastrict) *Official Journal* C191 29/07/92 p 1 and Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts *Official Journal* C340 10/11/97 p 0145.
[21] Lasok, *Law and Institutions of the EU* (Butterworths: London) (7th Ed.: 2001) at 30 – 31.
[22] Weatherill, *Cases and Materials on EC Law* (London: Blackstone Press) (5th Ed.: 2000).
[23] Lasok, *Law and Institutions of the EU*, at 31.

1.2 : Traditional Theories on Recognition

Before the different theories are examined it should be mentioned that underlying all theories of recognition is the presupposition that there are certain criteria which an entity should have achieved before it should be recognised as a state. For the purpose of this debate as to the traditional theories it can be argued that the exact description of which criteria these are does not matter. This is because the point of the question asked here is, what label is attached to recognition once a state chooses to recognise an entity, regardless of under what criteria they make that decision? Whether the chosen criteria are good or bad, *may* or *may not* help a state in recognition decisions. Indeed, it is true to say that the role those criteria play in the recognition decision is important as this may assist in deciding whether recognition is declaratory or constitutive.[24] Nonetheless, this is a qualitatively different debate from spending time debating exactly what the criteria are.

Despite this, it seems necessary to clarify the generally recognised main criteria for the achievement of statehood at the outset. These are laid down in Article 1 of the *Montevideo Convention on Rights and Duties of States*[25]:

> "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states."

Whilst this list is by no means exhaustive of every situation and in some situations a state may be deemed to exist before it has fulfilled all of the above criteria[26] it is a useful place to begin when considering claims of Statehood as it is "commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law."[27]

These criteria can be added to and different emphasis may be placed on one or more of them. However for the current debate it is argued that a basic description is sufficient, since as stated above this part of the thesis is interested in a different question in relation

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[24] As to constitutive and declaratory recognition theories see sections 1.2.1 and 1.2.2 respectively.
[25] 165 *LNTS* 19.
[26] As will be discussed later in this chapter in relation to self determination and the examples of representative groups (sections 3.2.1 and 2.1.1-4 respectively). See also section 1.2 in Chapter Three regarding the criteria for a government in international law.
[27] Harris, *Cases and Materials* (5th Ed.), at 102.

to recognition rather than the complexities of exact criteria.[28]

Returning to the question asked originally, the recognition debate has traditionally centred around the constitutive and declaratory theories which propose different methods in international law for a entity to become a legitimate subject of international society in international law.[29] However, they both adopt an 'all or nothing' approach to the effects of recognition (i.e.: An entity is recognised as a specific thing e.g. state or government or it is not recognised at all). This does not appear to encompass a theory which would enable representative groups to sit somewhere between unrecognised entities and states, thus it is questionable whether the traditional doctrines fit with more recent practice which can be considered to evidence a transitional period.[30]

These two differing descriptions of the law will be considered in greater detail in an effort to establish if either afford any insight into the role which recognition plays. This is important because in order to determine the value of recognition it is necessary to understand whether it is recognition which creates status or whether status is determined as a matter of fulfilment of objective criteria (whatever those criteria may be) and then recognition merely plays a factual role by demonstrating that an entity has fulfilled them.

It has been suggested that the declaratory/constitutive debate is not sufficiently up to date with recent recognition practice, particularly in the light of the recent state practice in the former Soviet Union, the Baltic States and the former Yugoslavia. Recognition, which it has been argued, is governed more by political interests[31] and the willingness of the new entity to be governed by principles of international law.[32] These theories rely more heavily on the technique of approaching recognition as enunciated by Brownlie, who advocates that what is to be sought is the intention of the government

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[28] Some writers, for example, have advanced the theory that there are other emerging criteria for recognition. Franck discussed the potential for a right to democratic governance. See Chapter Three for further discussion of the possible criteria as it is more pertinent to the debate at that point in the thesis. Although the issue of legitimacy is also briefly dealt with in section 3.1.2 of this chapter.

[29] Notably see, Chen, *The International Law of Recognition* (L.C.Green (Ed.)) (London: Stevens & Sons) (1951); Crawford, *Creation of States* and Lauterpacht, *Recognition in International Law* for detailed discussion regarding these two schools of thought.

[30] See above section 1.1.1 regarding the transitional period and section 1.2.4 below regarding the recent practice.

[31] Chapter 4 of Müllerson, *International Law, Rights and Politics* and Warbrick, "Recognition of States: Recent European Practice" chapter 3 from Evans (Ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe: EC/International Law Forum II* (Aldershot: Dartmouth) (1997).

when it recognised the relevant entity and that status is primarily a question of fact in any case.[33] Here, it is aimed to combine the essential discussion of the value of recognition with the practical factual analysis advocated by Brownlie. The factual approach will be taken in Chapter Three when state practice regarding Palestine is considered. However, the factual situation that any entity finds itself in is most often as a result of the international community recognising and enabling it to participate at an international level by allowing it access to the fora it requires in order for its voice to be heard. This means that even if a factual approach is taken, it is still necessary to make clear what the value of recognition is and whether it in itself is a creator of status.

Even if the constitutive and declaratory theories are outdated, they must be examined here because they are still the primary descriptions of how recognition is linked to the achievement of personality and therefore are vital to understand if a valuable study of current recognition practice in relation to status is to be achieved.

1.2.1: The constitutive theory of recognition

In a nutshell, the constitutive theory bases its proposition on the assumption that the rights and duties pertaining to status come only from recognition. From a very pure constitutive viewpoint it is impossible to argue logically that there are ever any circumstances which can give rise to a *right* to a particular level of status in international law.

The theory has been supported by some of the most eminent international legal theorists.[34] It places emphasis on the role of existing states in determining the emergence of a new subject of international law.[35] By the process of recognition entities could be created as members of the family of nations and thus be subject to the rules of international law.

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[32] Hillgruber, "The Admission of New States to International Community" (1998) (9) *EJIL* 491.
[33] Brownlie, "Recognition in Theory and Practice" (1982) *BYBIL* 197, at 199.
[34] For example, Lauterpacht, *Recognition in International Law* and also Oppenheim. (see, Jennings & Watts (Eds.), *Oppenheim's International Law* (Harlow: Longman) (9th Ed.: 1992).
[35] Lauterpacht is keen to point out that this falls to states merely because an "impartial, international organ" has not been established to carry out this function, (Lauterpacht, *ibid.*, at 55) and makes clear his preference for this function to be carried out collectively through such an organ, (Lauterpacht, *ibid.*, at 165 – 166).

The issue under the constitutive doctrine is whether the existing States in the international community choose to accept a "potential" entity as a subject in their international society. Under this theory the decisions of states must therefore be legally definitive. However, if this is a correct description of the law,

> "international law would be merely a system of imperfect communications: every rule of international law would be the subject of, in effect, an 'automatic reservation' with respect to every State (in the absence of the compulsory jurisdiction of some court or tribunal)." [36]

Furthermore, if recognition by a state is decisive in law then it is extremely difficult to imagine a situation where recognition is deemed to be illegal and "quite impossible to conceive of a recognition which is invalid or void."[37]

A second criticism of this theory is that its relativism negates its worth as an acceptable legal theory.[38]

> "...since a State actually comes into being by way of recognition, it is clear that it exists only in relation to those States which have recognised it. Thus, not only is the actual beginning of a State's existence different in time and in relation to every recognising State, but, moreover, 'States exist only in a relative sense' (Kelsen, "Recognition in International Law" (1941) *AJIL* 609). In other words, they exist and do not exist at the same time."[39]

Indeed, proponents of the constitutive theory do admit that this is a problem,[40] but generally do not regard it as a sufficient difficulty not to continue to adhere to this school of thought. [41] The relativism of this theory when applied to a politically divisive situation can cause major problems. Relativism would be a major difficulty where recognition of a particular entity would mean taking a political stance for or against another entity as a result. This might prove complicated in any scenario where there were competing claims to represent the territory. Recognition of a representative group would thus have an impact not only on the entity recognised but also the entity which

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[36] Crawford, *Creation of States,* at 18.

[37] *Ibid.* However it is possible for recognition to be criticised and classed as an international delict if recognition adversely affects the territory of an existing state. A good example of this is premature recognition of a liberation movement, like the situation in Algeria in the late 1950s. See Wilson's description in: Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press) (1988), at 108 – 111. The attempted secession of Biafra from Nigeria in 1967 was also recognised prematurely by a very few African States, as was the government set up by the PAIGC in Guinea-Bissau in 1973, except that there the United Nations General Assembly led the way in recognition. See section 2.1.1 below. For further discussion of premature recognition see also, Lauterpacht, *Recognition in International Law*, at 7 and Marek, *The Identity and Continuity of States* (Geneva: Librarie Droz) (1968), at 153 – 154.

[38] Crawford, *ibid.*, at 19 – 20.

[39] Marek, *The Identity and Continuity of States,* at 132.

[40] Lauterpacht, *Recognition in International Law*, at 77 – 78.

was making a competing claim. States would have to chose which "side" to support and this may often have ramifications for the state in terms of its relations with states that chose to support the other entity's claims.

Due to the political results which constitutive recognition tends to bring because of its relativism, politics are thus more likely to be brought into the decision-making process. Therefore, recognition and non-recognition and outright opposability to a particular level of status can be as a result of political stance.

The essence of the doctrine of constitutive recognition is explained above, however when the theory is examined in greater detail it can be seen that there is a divergence of opinion as to the nature of the situation in law which results in the act of recognition itself.[42]

On this issue, it may be argued either that there is a duty to recognise once an entity has fulfilled certain criteria, or that the recognising state chooses to do so as a matter of arbitrary policy. Thus states will recognise that a particular entity has fulfilled certain specified criteria, however it is the recognition and not the fulfilment of the criteria which then endows the entity with international rights and duties. Since this is the case, despite the 'criteria requirement' this is still within the scope of the constitutive rather than the declaratory theory of recognition.[43]

Nonetheless, the notion of placing importance on the fulfilment of criteria does hark back to the declaratory theory, since by

> "...avoiding the arbitrariness, otherwise implicit in the constitutive view...this merit...constitutes its fundamental weakness: for by postulating such conformity, the doctrine falls back on general international law as the only truly decisive criterion of the existence of States. This is nothing but a return to the declaratory theory."[44]

However, amongst the constitutive proponents there is far from consensus as to the concept of a legal duty to recognise.[45] Those constitutive adherents which disagreed

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[41] See also Marek, *The Identity and Continuity of States*, at 132 – 134.
[42] It should be noted that recognition can be express or implied. Due to the parameters of this study this particular element of the general debate on recognition will not be discussed here but for more comment on implied recognition see, Chapter XX of Lauterpacht, *Recognition in International Law*.
[43] *Ibid.*, at 51.
[44] Marek, *The Identity and Continuity of States*, at 137.
[45] Kunz, "Critical Remarks on Lauterpacht's 'Recognition in International Law' " (1950) 44 *AJIL* 713.

often took a positivist approach.[46] This is perhaps because positivists would tend to have a more state-centric theoretical perspective.[47] Thus the notion that the sovereign state should have less discretion to exercise in the determination of statehood due to being under a duty to recognise would be therefore untenable.

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[46] See for example, *ibid.*
[47] See, Dugard, *Recognition and the United Nations* (Cambridge: Grotius) (1987), at 6 & 7 – 8.

1.2.2: The Declaratory Theory of Recognition.

Proponents of the declaratory view take the stance that once an entity has met certain requirements it is automatically qualified to become a subject of international law.[48] Recognition is then only a political act which does not affect the entity claiming status in international law. Recognition is thus simply the process by which states declare their acknowledgement of the fact that the entity is a subject of international law.

Many eminent jurists of this century advocate the declaratory doctrine as the correct interpretation of international law including Chen,[49] Higgins,[50] Brierly,[51] Brownlie[52] and Marek; "...recognition is both declaratory and political"[53] and that "...it may be safely asserted that the constitutive doctrine is just as untenable in logic as it is in law."[54]

Consistency is certainly regarded to be one of the chief merits of the declaratory theory.[55] The act of recognition then being simply a mark of political accommodation rather than decisively constitutive.[56] This is not to argue however, that such an act could not then go on to have important political and even legal ramifications.[57]

Many of the writers referred to above are fairly condemnatory of the problems associated with the constitutive theory, particularly in relation to its relative and arbitrary practical difficulties, as discussed in the previous section. However, the declaratory doctrine is not confined to theory as there a number of instances where the declaratory approach has been adopted by international tribunals or commissions when considering recognition issues.

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[48] For statehood these qualifications are generally thought to be a defined territory, a permanent population, a government and the capacity to enter into relations with other states see the Montevideo Convention, *supra.* note 19 - see section 1.2 above and for further discussion see Chapter Three, section 1.1.

[49] Chen, *The International Law of Recognition.*

[50] See Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University Press) (1963), at 135 – 136.

[51] Brierly, *The Law of Nations: an Introduction to the International Law of Peace* (Waldock (Ed.)) (Oxford: Oxford University Press) (6th Edition: 1963), at 139.

[52] Brownlie, *Principles of Public International Law* (5th Ed.), at 87 – 88. It should be noted that Brownlie considers that "...to reduce, the issues to a choice between the two opposing theories is to greatly oversimplify the legal situation.", at 88 – 89.

[53] Marek, *The Identity and Continuity of States*, at 131.

[54] *Ibid.*, at 153.

[55] Crawford, *Creation of States,* at 20.

[56] *Ibid.*, at 23

[57] *Ibid.*, at 23 – 24.

The *Tinoco Arbitration* is a well known example of such an occasion.[58] Here the arbitrator, William H. Taft, discussed the issue of recognition. He held the view that recognition cannot be the sole determiner of status and that it is linked to factual considerations regarding the position of the entity (in that instance, the government of Costa Rica) which must also play a role.[59] This decision clearly supports the notion of personality as linked to factual criteria, meaning that it is less subjective and therefore that recognition is not the main creator of status.

The *Report of the Commission of Jurists on the Aaland Islands* also dealt with the issue of recognition in attempting to establish when Finland became independent.[60] More recently, the situation of the Former Yugoslavia has generated further debate on the issues of recognition.[61] In that context the Badinter Arbitration Commission made a more decisive determination of the correct interpretation of international law and the relevance of recognition to the status of entities.[62] The Commission considered *inter alia*, the question of whether the republics which emanated from the Former Yugoslavia were seceding from the federation or causing its disintegration and thus whether there could be any continuity of statehood. Naturally the issue of recognition arose in this discussion and the Commission stated that:

"The answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state; that in this respect, the existence or

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[58] Great Britain v Costa Rica (1923) 1 *RIAA* 369.

[59] This position has been adopted in relation to states as well as governments. See, Deutsche Continental Gas-Gesellschaft v Polish State (1929) 5 *AD* 11, at 13: "...the recognition of a State is not constitutive but merely declaratory".

[60] Aaland Islands Case (1920) *LNOJ* Special Supp. 3, 3. One of the principal questions which arose in the case was the date on which Finland itself became a State. The Commissioners used examples of the relations which Finland had at an external level with other states as evidence of its status in international law but were unwilling to consider it as the sole factor for determinations of statehood. The Jurists looked partly at recognition but also at other conditions which they deemed to be necessary for the formation of a state, namely the concepts of effective government and independence (or 'sovereignty') in their report.

[61] The EC took a particular interest in the emergence of new states in the areas surrounding Western Europe and it was agreed that a common position for Member States would enhance any the influence they had. As a result, at a meeting of Foreign Ministers in December 1991 the 'Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union' was agreed upon: Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991; (1993) 4 *EJIL* 72.

[62] Arbitration Commission, E.C. Conference on Yugoslavia, January 11 1992, 92 *ILR*. The EC proposed a continuing conference at the end of August 1991 between representatives of Yugoslavia and the Republic and the European Community and its States with provision for an Arbitration Commission, the President of which was Badinter. Badinter Commission Opinions can be found at (1992)31 *ILM* 1488 and 92 *ILR*.

disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory;".[63]

However, the use of the declaratory theory is not limited to the international sphere. Domestic courts are often likely to use the declaratory theory when examining questions of status.[64]

Such examples are strong evidence of the support for the declaratory theory in both national and international practice. However, it is interesting to note that these are decisions of tribunals and courts. In contrast, much of the state practice which is often used to support the constitutive theory is generally practice of individual states and their governments.[65] This is perhaps an obvious statement given the policy dominated constitutive doctrine and the apparently more objective declaratory approach. It is then arguably more likely that a tribunal would be more inclined to take a declaratory angle to recognition since there is less likelihood of any political bias affecting decision making, whereas in government-made decisions a political element to all decisions is almost inevitable.

However, such discussions do not make the establishment of the law any easier. As recognition is governed primarily by the practice of states, the task of tribunals is to clarify that state practice and respond to it according to the relevant law. However, if the states and the tribunals are starting from differing legal doctrinal bases then there is the danger that states practice could be used in a way which was not intended by the states in question. It would be simple for a tribunal to attach importance to certain factual criteria which did not play a role in recognition but were elements of the factual scenario at the time of a policy based decision, thus unintentionally distorting the descriptions of the state practice at hand.

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[63] *Ibid.*, Opinion No. 1, at 162. Furthermore, in response to a question as to when the dissolution of the former Yugoslavia was complete, the Commission noted once more that, "while recognition of a state by other states has only declarative value, such recognition, along with membership of international organisations, bears witness to these States' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law.", *Ibid.*, Opinion No. 8, at 199.

[64] In Democratic Republic of East Timor, FRETILIN and Others v State of the Netherlands 87 *ILR* 73, at 73, the Court used the traditional criteria laid down in the declaratory theory of statehood to determine the status of East Timor. However, it was also stated that non-recognition by the majority of States "...suggested that the international community did not regard these factual criteria as having been fulfilled." See also by way of example, Klinghoffer v SNC Achille Lauro 96 *ILR* 69 and Deutsche Continental Gas-Gesellschaft v Polish State (1929) 5 *AD* 11, at 15

[65] As demonstrated in Lauterpacht, *Recognition in International Law* through the vast array of State practice presented therein.

Therefore, whilst being extremely useful in demonstrating the examples of the declaratory doctrine, state practice is not necessarily decisive as some support for each theory can be found, depending on what type of practice is examined.

1.2.3: Some basic conclusions regarding the declaratory/constitutive debate

Given the vast array of conflicting literature and practice available for study, beyond that which has been listed here, it is extremely difficult to come to much of a decision as to which is the better description of the law. There certainly seems to be truth in both theories as states clearly wish to retain some subjectivity in recognition decisions but the use of specified criteria is evident in many scenarios. The declaratory doctrine is more just in its application of criteria to all potential subjects of law, but suffers from the lure of political considerations which are so easily drawn into decision making. However, the categorical constitutive doctrine is unacceptable in terms of its lack of certainty, since in principle as an extreme example, a state should not be entitled to deny the existence of criteria and thus treat an entity as though it was not a state in law.

However, the issue of recognition and at what point an entity achieves personality is not only of importance to the recognising state. It is vital to the activities of the entity seeking recognition. From the perspective of such an entity each theory has its benefits. The declaratory doctrine would benefit entities which satisfied the relevant criteria and the political problems associated with support would be less problematic as recognition could become the norm and not be seen so much as a declaration of policy against any competing state's claims. This could in turn assist in the realisation of the rights of such entities.

The alternative argument is that the constitutive doctrine can enable groups seeking recognition to fulfil their aims even if they do not fulfil all the relevant criteria as sufficient recognition can assist in the creation of states or governments.[66] Conversely, however, the constitutive doctrine can also serve to stop emerging entities which do

[66] See section 2.1.3 below in relation to the FLN in Algeria.

fulfil the relevant criteria from achieving their aims due to the political situation in which they operate and is therefore less desirable.

Generally speaking however, recognition is an element of state practice which can potentially change on a regular basis since states face this issue in relation to many different entities all the time. Furthermore, as mentioned above, there have been a number of recent examples of state practice which have called these traditional doctrines into question and reasserted the political elements present in the recognition process.

It is vital to look at the recent practice since it is one of the reasons that the constitutive/declaratory debate is under some strain. Arguably the debate is out of date because both theories only rely on an approach to status where an entity may be classed either as a full state or a government or as having no status at all. It does not allow for entities to obtain a status which is between the two, giving them a limited amount of personality in the international community during their transitional periods.

1.2.4: Modern approaches to the recognition theories and the effect of some recent practice

There have recently been a number of instances where new states have claimed or reclaimed their independence. Notably in the former Yugoslavia, the Baltic States and the disintegrating Soviet Union. These examples have provided ample chance to examine the emerging trends of recognition in international society. It has been suggested that the practice regarding these claims demonstrates the way in which politics can affect recognition.[67]

As both the dismemberment of the USSR and the former Yugoslavia were occurring at a similar time in the early nineties the political scenario was one in which the

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[67] Müllerson, *International Law, Rights and Politics.* Rich also takes this approach, suggesting that, "...recent recognition practice has defeated arguments that there is a legal duty to extend recognition to an entity bearing the marks of statehood. Recognition of states is today more of an optional and discretionary political act than was thought to be the case only a year ago.", Rich, "Recognition of States: The Collapse of the Yugoslavia and the Soviet Union" (1993) 4 *EJIL* 36, at 36.

governments of the Western world were not keen to set precedents regarding recognition to one group of states in case other groups should take that as the go ahead to dismember in anticipation of being treated in a similar way.[68]

1.2.4.1: The Baltic States

The state practice in relation to the recognition which was accorded to the Baltic States at the time of the disintegration of the USSR is instructive regarding the way in which States approach the issue of recognition.

The Baltic States (Latvia, Lithuania and Estonia) were recognised as independent States in the early 1920s after the First World War. In 1939 the Molotov-Ribbentrop Pact was signed which planned the annexation of the States to the Soviet Union and in summer of 1940 a Soviet invasion put puppet governments in power which "asked" that they become part of the USSR. Most Western States did not cease their *de jure* recognition of the Baltic States but in practice accepted the Soviet Union's *de facto* control over the territories.[69]

It is crucial to note that many Western States had as a matter of fact recognised the annexation of the Baltic States into the Soviet Union and treated them as part of the USSR, even if they then went on to deny that they had ever recognised their incorporation *de jure*.[70] This is surely evidence of states using the distinction between *de jure* and *de facto* recognition for their own diplomatic purposes. Recognition must surely be politically at the discretion of each state if a state is able to refuse to recognise an entity *de jure* and then goes on to act to all intents and purposes as it would had *de jure* recognition been granted. The fact that a state can treat a non-recognised entity as a fully fledged state when it is convenient, is clearly an example of the political nature of recognition.

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[68] Senator Evans, (Australian Minister for Foreign Affairs at the time of the break-up of the Former Yugoslavia) identified the four criteria for statehood in the Montevideo Convention and added to that the criteria of the government in question being in effective control of the territory concerned. He also stated that, "it is a matter of adopting some consistency in the way in which one deals with these situations otherwise one gets caught up in the most terrible conundrums in dealing with secessionist movements or splits of one kind or another in states all around the world.", *Australian Hansard*, Senate, 20 August 1991 – Cited in Rich, *ibid.*, at 40.

[69] Benton, "The Plight of the Baltic States" (1985) 180 *Conflict Studies* 2

[70] Müllerson, *International Law, Rights and Politics*, at 120.

In addition, a further interesting point which can be drawn from the situation which occurred during 1992 is the importance recognising states place on the acquiescence of states which will loose some of their territory or authority if a new state comes into being – here the Soviet Union. To ensure that Western recognition would not cause a political row with the USSR, President Bush wrote to President Gorbachev asking him to recognise the Baltic States' independence speedily, noting that the West would take this as their lead. [71] President Bush was concerned that recognition without the blessing of the USSR could be seen as intervention in its domestic affairs. This raises a whole series of questions in relation to competing claims for sovereignty which are discussed below in section 3 on self determination and recognition. It demonstrates that recognition may be withheld until the political climate is likely to be favourable.

The illegal annexation of the Baltic States to the Soviet Union in 1940 made it harder for the Western states to deny recognition for any long period of time. Therefore any act of recognition prior to the Soviet Union's acceptance of the disintegration of the Union could arguably have simply been a return to the correct legal status of the Baltic States. Recognition could thus have been justified on the grounds of their illegal annexation in 1940 because legally if a state commits an international delict, matters which arise as a result of it cannot be considered to be within that states domestic affairs.[72]

It is submitted that this recent practice demonstrates that political factors are often at play in the decisions which states make to recognise or not recognise a new state. This means that in practice each state exercises its own discretion whether or not to recognise a new state. There is clearly a strong element of discretion to be exercised on the part of states as demonstrated in the attitude of Western States to the Baltic States. Therefore it should be remembered that any example of recognition must be seen in the light of the prevailing political climate between the two entities. From these examples overall then the..

"...meaning of the term 'recognition' depends entirely on the intention of the State using it within the factual and legal context of a particular case".[73]

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[71] *Ibid.*
[72] *Ibid.*, at 121 - 122.
[73] Talmon, *Recognition of Government in International Law: With Particular Reference to Governments in Exile* (Oxford: Clarendon Press) (1998), at 42

1.2.4.2: The European Community Guidelines on Recognition

After the referendum in the Ukraine which resulted in an overwhelming vote for independence, the time came when the States of Western Europe needed to consider the issue of Ukrainian recognition.[74]

The European Community (EC) had recently taken on the task of mediating between the different factions in the Balkans. The EC drew up a number of guidelines in order to attempt to influence the situation through applying further criteria to the usual rules on recognition in order to try to resolve the conflict.[75]

The Declaration by the EC stated that the EC would be willing to recognise new states;

> "...subject to the normal standards of international practice and the political realities in each case those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.."[76]

As was pointed out at the time, the caveat concerning the "political realities in each case" should be noted. This enunciates the concept as expressed in the traditional approach to the constitutive doctrine of recognition.[77] It has thus been argued that,

> "..the EC countries took the view that recognition should be used more as an instrument of foreign policy rather than a formal declaration of an ascertainable fact."[78]

However, in addition the EC laid down a series of other criteria which had to be complied with before recognition would be granted:

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[74] However, "...there was one strong political factor mitigating against early recognition. President Gorbachev was working towards a Union Treaty which would preserve a Soviet centre and countries were loathe to undercut the stability that such a move seemed to represent, particularly in terms of continuing Soviet acceptance of its obligations under the various disarmament treaties.": Rich, "Recognition of States: The Collapse of the Yugoslavia and the Soviet Union", at footnote 45.

[75] See also Kingsbury's analysis of 'The European Community and Yugoslavia' in Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 *Cornell ILJ* 481, at 504.

[76] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', cited in Rich, "Recognition of States: The Collapse of the Yugoslavia and the Soviet Union", at 43.

[77] Rich, *ibid.*

[78] *Ibid.*, at 55.

- Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights.
- Guarantees for the rights of ethnic and nation groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.
- Respect for the inviolability of all frontiers which can only be changed by peaceful means and common agreement.
- Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability.
- Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes."[79]

These criteria, whilst possible to class as supporting a discretionary approach to recognition, could also be considered to fall within a declaratory approach since they at least enunciate and clarify the instances in which recognition will be accorded. However, it is true that they can be changed at any time and are subject to the "political realities in each case" which weakens this argument somewhat. Indeed, this is what occurred in relation to the potential states of the former Yugoslavia. The EC went on to lay down some further guidelines in addition to their initial statement given above. These included:

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- They accept the commitments contained in the above mentioned guidelines. *[as above]*
- They accept the provisions laid down in the draft convention – especially those in Chapter II on human rights and rights of nation or ethnic groups – under consideration by the Conference on Yugoslavia.
- They continue to support :
  - the efforts of the Secretary General and the Security Council of the United Nations, and
  - the continuation of the Conference on Yugoslavia…

…The Community and its Member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of denomination which implies territorial claims."[80]

These issues can together be taken to incite value judgements about the potential states and show a shift away from recognition as merely a formal acceptance of rigid criteria as far as EC member states are concerned.[81] It should be remembered that these are conditions set in addition to the traditional criteria for statehood as given in the *Montevideo Convention*, rather than instead of them and that as such the original criteria

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[79] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'.
[80] Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting).
[81] Rich, "Recognition of States: The Collapse of the Yugoslavia and the Soviet Union", at 56.

still stand as the accepted principles by which the declaratory doctrine operates.[82] However, it is possible to argue this that new practice adds to these criteria the *realpolitik* of international policy. What these new criteria deal with, to a certain extent, is future fact in relation to the emerging states. However, as value judgements they are also analysing the factual scenario in each territory and, due to the nature of these criteria, it is suggested that they indicate a desire to accord recognition only to entities which will uphold basic principles of international law. [83] It may be argued that this simply elaborates on the 4th criteria of the *Montevideo Convention* which requires that States have the "capacity to enter into relations with other States"[84], however it is argued here that by giving such specific criteria which relate directly to the ethnic and religious problems in that situation that more of an *ad hoc* approach has been taken to recognition than was intended by the creators of the Montevideo Convention who were attempting to create more certainty in recognition through an international agreement.

It is submitted that this practice potentially paves the way for different criteria to be set in relation to individual cases of recognition. As the need for recognition springs from different political situations the EC Guidelines would not have to be followed again and it remains to be seen whether they will be. It is true to say that they move away from the constitutive doctrine in that guidelines were set by a regional body rather than on an purely *ad hoc basis* by individual States. However, in practice the Guidelines which the Badinter Commission applied were not followed by the States of Europe in their recognition decisions. That practice is considered below.

However, it could equally be argued that these EC conditions are new emerging criteria

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[82] See above section 1.2 regarding the basic criteria for statehood. See also section 1 in Chapter Three for further discussion regarding criteria.

[83] A similar argument has been adopted by Hillgruber. He states that recognition in the Former Yugoslavia was granted based on the criteria of whether an entity was a "reliable member of the international community". Bosnia is cited as an example since, due to calls to "internationalise" the conflict in order to apply the international law of *jus ad bellum* and *jus in bello*, the status of 'State' was conferred on it by way of a "legal fiction". He also uses the examples of the non-recognition of Rhodesia, the South African Homelands and the Turkish Republic of Northern Cyprus to demonstrate that political decision may have legal effects – the upshot of which is that there is no *right* to recognition even if traditional criteria are fulfilled: "The power of the existing sovereign states to decide whether to recognise the new state, by which they evaluate its reliability as a partner in international relations, means that they existing states continue to be 'masters' of the procedure: by exercising their prerogative to evaluate the new comer, they form their own final judgment concerning its ability and willingness to be integrated into the international community and adhere to its rules." Hillgruber, "The Admission of New States in the International Community", at 494 – 5.

[84] Montevideo Convention, *supra.* note 19. For discussion regarding the Montevideo Convention see, Grant, "Defining Statehood: The Montevideo Convention and its Discontents" (1999) 37 *Col JTL* 403.

to add to the declaratory criteria which exist already, or that they are merely guidelines to be borne in mind when applying the declaratory theory. It is not yet possible to determine whether these criteria or guidelines will be used again. As new cases of recognition emerge such analysis will be possible. For the moment the EC guidelines seem not to provide an additional set of criteria for future use, but indicate factors which may influence States recognition policy. Furthermore, the caveat as to *political considerations* shows that States do not consider that recognition decisions exist in a legal vacuum but in the realities of the domestic and international political climate.

1.2.4.3: The Practice of the European States and the Badinter Commission

With this in mind, it is constructive to compare what the Badinter Commission stated in its Opinions[85] with what the European States actually did in relation to recognition.

- Former Yugoslav Republic of Macedonia[86]

The Badinter Commission advised that the Republics of Slovenia[87] and Macedonia[88] satisfied the criteria which had been laid down by the EC Foreign Ministers.[89] However, in the wake of the Commission's Opinion on the achievement of the Foreign Minister's Criteria, Macedonia was not recognised by the European States. It was difficult to deny Macedonia's right to statehood; however Greece harboured concerns about the emerging State. It was worried that that the Northern Greek area of Macedonia might be under threat from the new State[90] and objected partly to the naming of the new State identically to the northern Greek province.[91] Therefore the European States had in effect supported the concerns of Greece at the expense of the recognition of the emerging State.

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[85] Badinter Commission Opinions (1992) 31 *ILM* 1488.
[86] hereafter 'Macedonia'.
[87] Badinter Commission Opinions no. 7, January 14 1992.
[88] Badinter Commission Opinions no. 6, *ibid.*
[89] See section 1.2.4.2 on EC Guidelines above for criteria.
[90] See Janev, "Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System" (1999) 93 *AJIL* 155 and Warbrick, "Recognition of States: Recent European Practice", at 29.
[91] Müllerson, *International Law, Rights and Politics.*

- Croatia

The Badinter Commission stated that Croatia did not fulfil the criteria since there were concerns as to the Croatian protection afforded to Serbian minorities (but that this could probably be amended in the near future).[92] It also seems evident that due to the lack of protection for the Serbian population of Croatia, parts of the territory were under *de facto* Serbian control therefore the Croatian government was not in effective control of the entire area. Therefore, in addition to the problems enunciated by Badinter, *any* recognition was arguably premature.[93]

However, Croatia was recognised as a State by the States of Europe.[94] This was despite the fact that it had not, according to Badinter, satisfied the criteria laid down by the Foreign Ministers.

- Bosnia

The Commission emphasised that in Bosnia, popular consent to independence was not necessarily evident.[95] The States of Europe then later offered to assist in supervision of a referendum on independence[96] which took place on 29 February and 1 March. The majority of the population voted in favour of independence, however the Serbians in Bosnia did not vote at all and soon after this recognition was accorded.[97]

It is clear that the emphasis of the Badinter Opinion regarding the situation in Bosnia was once again ignored by the subsequent practice of the European States. Badinter had placed importance on the will of the people of Bosnia for independence but the Europeans had supervised and given credence to a referendum which failed to take into account the wishes of a significant group within the emerging state.

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[92] Badinter Commission Opinion no.5, January 14 1992.
[93] For discussion surrounding premature recognition see section 3.2.1 in this chapter and section 1.2 in Chapter Three.
[94] Germany initially recognised Croatia on 23 December 1991 and then other European States followed suit. See Warbrick, "Recognition of States: Recent European Practice", at 29 - 30.
[95] Badinter Commission Opinion no. 4, January 14 1992.
[96] EUROPE, No. 5670, 17 – 18 February 1992, 4.
[97] Warbrick, "Recognition of States: Recent European Practice", at 30.

1.2.4.4: Conclusions Regarding the Badinter Commission and the Practice of European States

The behaviour of the European States towards Macedonia is a clear example of the political concerns of one State influencing the recognition behaviour of other States. Furthermore, the States, in not recognising Macedonia after the effective "legal go-ahead" from the Badinter Commission, reaffirmed the discretion they clearly believe they have in relation to recognition. Suggesting that many influential States do not consider themselves under a legal duty to recognise even when a State has been declared to have fulfilled the requisite criteria which effectively they had set.[98]

The practice regarding Croatia shows that the additional criteria which the foreign ministers had set out were very much political guidelines rather than additional legal criteria. If the European States had intended them to be legal criteria they would certainly have refused recognition of Croatia until it was clear that minorities were effectively protected within the territory. The European States were thus clearly not following the approach to recognition as advocated by Badinter through the setting of criteria and were happy to import political judgement into recognition decisions. Indeed that caveat regarding the "political realities in each case" given in the Guidelines was reiterated by Mr Douglas Hurd the then British Secretary of State for Foreign and Commonwealth Affairs. He stated in relation to the recognition of Croatia that, "we must deal with realities, and the reality was that Croatia existed."[99] Furthermore, later that same year in a letter, the Minister of State for the Foreign and Commonwealth Office wrote, "[The]...criteria are always subject to interpretation in the light of the circumstances on the ground."[100] These examples demonstrate the political reality which states are keen to operate in. This gives them the flexibility to use their discretion by balancing their needs, the needs of the international community and the needs of the entity claiming status.

In Bosnia, once again the European States went against the spirit of the Badinter Commission's findings and also against the spirit of self determination through their ignoring of the Serbian population.

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[98] Macedonia has since been formally admitted as a member of the United Nations: Security Council Resolution 817, April 7 1993.
[99] House of Commons Debates, vol. 259, col. 332: 3 May 1995; (1995) *UKMIL;* (1995) 66 *BYBIL* 616.
[100] House of Commons Debates, vol. 261, WA, cols.478 - 9: 13 June 1995; *ibid.*, at 617.

These examples of practice do not equate with the theory as enunciated by the Badinter Commission which kept to the Guidelines issued by the EC. As discussed above, whilst not fully in line with the declaratory theory as they were "subject to political realities" they did create additional criteria for a group of states which appeared to be at least less subject to relativism and international politics than a purely constitutive approach.

Overall, there seems to be a gap between the theories of recognition and what states actually do in situations of recognition.[101] It is submitted that it is the politics of international society which fill this gap. This is not to suggest that politics are the only considerations for states when recognising other entities, however the above practice shows that the legal aspects of recognition are certainly far from all that states take into account.

1.2.5: Recent case law regarding the Former Yugoslavia

It is interesting to note that the International Court of Justice was also called upon to consider the issue of Bosnian statehood.[102] Bosnia asked the International Court to rule that the Federal Republic of Yugoslavia had committed acts of genocide by attempting to destroy nation, ethnic or religious (notably Muslim) groups within Bosnia. Bosnia also submitted that Yugoslavia had aided and abetted perpetrators, conspired, attempted and incited genocide and further failed to prevent and punish such acts. The action requested that the Court declare that Yugoslavia desist from such conduct and that it must endeavour to restore the situation to that which existed before its violations of the Genocide Convention partly through the provision of compensation for damage and loss.

Yugoslavia contended that the case was inadmissible on various grounds relating to, (a) whether the conflict was national or international, (b) the application and interpretation of the Genocide Convention, (c) the effects of the non-recognition by each party of the other and also (d) whether Bosnia was a State and its succession to the Convention.

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[101] The same can also potentially be said in relation to situations of non-recognition. A state could continue to give effect to the legal acts of a non-recognised government or state. For example, Taiwan.
[102] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v Yugoslavia) Admissibility and Jurisdiction (1996) *ICJ Rep.* 595.

Bosnia counter-claimed that Yugoslavia had abused its rights through presenting its arguments, objecting to the Courts jurisdiction and the admissibility of the case. The Court was overall very brief in its consideration of this issue and it rejected those arguments relating to non-fulfilment of admissibility criteria on grounds of Bosnian lack of statehood by a large majority. Indeed, "The Court's brevity seems an over-reaction to the lengthy judgments of the past as it leaves the reader uncertain about the legal reasoning..."[103]

However this case is very interesting when compared with the Court's opinion in a number of later cases brought this time by the Federal Republic of Yugoslavia.[104] In these actions FRY submitted that the NATO countries had violated the prohibition on the use of force through their bombing campaign in Kosovo.[105] FRY argued that the Court had jurisdiction to hear this case under Article 36(2) of the Statute of the International Court and also under Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide.*[106]

The NATO states submitted that their actions did not amount to genocide and that therefore the Genocide Convention could not be used as the basis for jurisdiction.[107]

The International Court found that the Genocide Convention could not be used by FRY

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[103] Gray, "Case Note: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Hercegovina v Yugoslavia) Admissibility and Jurisdiction" (1997) 46 ICLQ 688, at 689.

[104] Case Concerning the Legality of the Use of Force (Yugoslavia v Belgium) Request for the Indication of Provisional Measures (1999) *ICJ Rep.* Not yet officially reported. The Federal Republic of Yugoslavia also brought identical actions against all members of NATO, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States of America, all of which are cited in (1999) 38 *ILM* 950.

[105] For discussion regarding the NATO bombing see, Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 *EJIL* 1; Cassese, "Ex injuria ius oritur: Are we moving towards international legitimation of forcible humanitarian counter measures in the world community?" (1999) 10 *EJIL* 23; Orford, "Muscular humanitarianism: Reading the narratives of the new interventionism." (1999) 10 *EJIL* 679; Cassese, "A follow-up: Forcible counter measures and opinio necessitatis" (1999) 10 *EJIL* 791 and Kritsiotis, "The Kosovo crisis and NATO's application of armed force against the Federal Republic of Yugoslavia" (2000) 49(2) *ICLQ* 330.

[106] (1948) 78 *UNTS* 277. For discussion regarding the Genocide Convention and international criminal law see, chapter 17 "State Criminality and the Significance of the 1948 Genocide Convention" from Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press) (2000).

[107] On 8 July 2000 the *Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia: International Criminal Tribunal for the Former Yugoslavia* found that "If one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime case for charges of genocide or crimes against humanity" and therefore recommended that "...no investigation be commenced...in relation to the NATO bombing campaign or incidents occurring during the campaign", (2000) 39 *ILM* 1257, both quotations found at 1283.

to bring the case.[108]

This outcome is interesting given the Court's attempts to apply the Genocide Convention to Serbia in the previous case discussed. It is submitted that this decision reinforces the power balance in cases of new and emerging states, which does not lie with the newly created entity. This case demonstrates that the world community is willing to use international law principles and their application in order to fit the individual circumstances of a particular event, particularly when they are politically charged.

However, the story does not end there. In April 2001 FRY filed an Application for revision of the 1996 judgment delivered by the International Court of Justice in the first case referred to above concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide.* The case is currently on the docket of the Court and FRY contends that its admission to the United Nations as a new member on 1 November 2000 means that the earlier judgment must be incorrect since it was based on the continuity of statehood from the old Yugoslavia to FRY.[109] The outcome of the case is awaited and it remains to be seen how it will affect the points asserted in this chapter. Nonetheless, it demonstrates the problems which can occur when different parts of the international community (like the United Nations General Assembly and the International Court of Justice) take action which is governed by facts know at the time rather than by an objective set of norms which result in conflicting with each other.

1.2.6: The Internal Aspects of Recognition Theory

The effect of recognition decisions can also be felt at an internal level as well as on the international plane. Whilst this thesis deals primarily with personality at an

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[108] "...the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and whereas Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case;" Yugoslavia v Belgium, (1999) 38 *ILM* 950, at 960. 12 votes to 4 in Belgium case, 12/4 Canada, 12/3 France, 12/3 Germany, 13/3 Italy, 11/4 The Netherlands, 11/4 Portugal, 14/2 Spain, 12/3 UK and 12/3 USA.

[109] Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Hercegovina v Yugoslavia), Preliminary Objections (Yugoslavia v Bosnia & Hercegovina) (2001) *ICJ Rep.*, not yet reported.

international level rather than at an internal level, the status accorded to an entity by a domestic court can also be instructive in terms of assessing what recognition it has received and the level of status it has achieved. Therefore by way of example, a brief foray into the internal aspects of recognition is needed to show how national courts have approached the issue of recognition.

In the UK the problems which can arise when the government has chosen for political reasons not to recognise an entity but then an issue arises where the court needs to consider its personality are evident. In *Carl Zeiss Stiftung v Rayner & Keeler, Ltd. (No. 2)* Lord Wilberforce stated *obiter dicta* that it was an "open question" as to whether the courts must accept that there can be no validity flowing from the acts of governments which have not been recognised.[110]

In *Gur Corporation v Trust Bank and Africa Ltd.* the Republic of Ciskei was held by the Court to have standing to sue and be sued in English law despite the fact that it was unrecognised by the British Government because Ciskei was considered to be subject to the sovereignty of South Africa. The Court justified their decision by considering that Ciskei was an emanation of South Africa and was acting by virtue of a delegation of its legislative power. Therefore, at an internal as well as an external level it can be seen that courts are not necessarily bound in practice by the fiction of the recognition decisions made by their government.[111] This supports the assertions that decisions as to whether or not to recognise are not always followed in practice and that recognition decisions do not necessarily result in an 'all or nothing' situation for the unrecognised entity. Lack of formal recognition by a State does thus not automatically mean that an entity may not act at all on the international stage.

1.2.7: Conclusions regarding the practice

Some general comments can be drawn from the recent practice observed above in order to ascertain the basic trends in recognition. It is argued that recognition policy is affected by politics, however this, in itself, is nothing new. The crux of the issue arises

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[110] Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No. 2) (1967) 1 *AC* 853; (1966) 3 *WLR* 125; 43 *ILR* 3

[111] There are many other cases which also support this point. See *Hesperides Hotels Ltd. v Aegean Turkish Holidays* (1978) *QB* 205; *Gur Corporation v Trust Bank of Africa Ltd.* (1986) 3 *WLR* 583 and

however, in the determination of whether overall the politicisation of recognition in this recent practice has any bearing on the constitutive/declaratory discussion. The fact that states will exercise their discretion to recognise or not with the whole political scenario in mind, and that states are willing to allow purely political factors to influence their decision making, even if this goes against the apparent legal position (as in the case of Macedonia) clearly demonstrates that recognition cannot be solely declaratory in nature. Nonetheless, it would be difficult to sustain the argument that recognition is fully constitutive simply because of the introduction of politics to decision making as recognition will often only be granted when it is clear that certain factual requirements have been fulfilled. These requirements are often the traditional requirements of statehood but may also in addition include other *ad hoc* political or legal issues such as those laid down by the EC in relation to the former Yugoslavia or the new states willingness to be bound by international law.[112]

In the light of the foregoing discussion, recognition can thus be said to certainly have some specific constitutive elements. It may often serve to solidify the status of a state once the transitional period prior to full independence has begun. It can also serve to encourage other bodies and states to recognise the emerging state. If the result were to be that the majority of international opinion supported an entity, recognition would automatically affect the factual status of the entity, therefore having a constitutive effect.

It should be pointed out that the former Yugoslavia and the Former Soviet-Union practice described above does not necessarily equate to custom as an insufficient number of states have participated in the decision making processes and they are confined to a limited geographical region. Depending on how recognition is treated however, particularly by other organisations in the next few years, this kind of practice may be viewed as an emerging trend. [113] It would be possible to submit that this

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Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and Others: The Mary (1993) 1 *All ER* 371. See also, Shaw, "Legal Acts of an Unrecognised Entity" (1978) 94 *LQR* 500

[112] See the above section 1.2.4.2 and also Hillgruber's argument from "The Admission of New States in the International Community", at 494 – 5.

[113] It should be remembered that as organisations are formed by states and that regardless of whether one takes an implied or an inherent approach to their powers, following a realist approach, their policy and decision making is likely largely to follow a state-centric view of international society and is unlikely to venture outside the boundaries of the national interest when representatives are participating in voting and decision making. Thus it can be argued that it does not make a great difference whether states themselves, or organisations formed by states actually perform the recognition.

practice may only be likened to the break- up of federations of states in the future.[114] However, it is also clear that it is strong evidence of the way in which issues of recognition have been treated and of the gap which exists between the theory of recognition and practice. States take into account many different considerations when looking at questions of recognition. Political considerations both in terms of their individual relations with the new entity, their relations with other politically interested states and with the factual situation in the new state all play important roles. They all point to the fact that at the heart of these is the state's own interest, since a state's own interests are affected by the relationships it has with other existing states and also the application of certain principles. These principles may often include the universality of international law but may sometimes be governed by more specific aspects of the law and politics of nations.

However, there is one very important conclusion which can also be drawn from this practice, and it is crucial to the discussion as to the effect of recognition on representative groups. The declaratory and constitutive debate is, as demonstrated, antiquated and the recent practice shows that there is truth in both theories. Vital to this thesis it suggests that the effect of recognition for the recognised (or unrecognised) entity is not necessarily an "open-and-shut-case" in terms of the way it is then treated. Certainly the value of recognition in itself should not be underestimated as this no doubt affects whether an entity does eventually achieve its aims. However the *theory* behind which label recognition is accorded does not necessarily affect the status which the entity obtains. The theories about when or under what conditions an entity should be recognised in the EC Guidelines were not then followed in the practice of the European States.

Indeed the case of Croatia not fitting in with the Guidelines, its progression to the achievement of its aims was not hindered. Although for Macedonia, the opposite was true as it fitted all the criteria but did not achieve its aims due to non-recognition on

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For an in-depth discussion of this issue as to the source of powers of international organisations see, Sands & Klein, *Bowett's Law of International Institutions*; White, *Law of International Organisations,* at 118 – 123; Certain Expenses of the United Nations (1962) *ICJ Rep.* 151 and Rama-Montaldo, "International Legal Personality and the Implied Powers of International Organisations" (1970) 44 *BYBIL* 111.
See also, Goodwin, "World Institutions and World Order" from Cosgrove & Twitchett (Eds.), *The New International Actors: The United Nations and the European Economic Community* (London: Macmillan) (1970), at 55 – 75 for a discussion as to the state- centred policy of organisations.
[114] Rich, "Recognition of States: The Collapse of the Yugoslavia and the Soviet Union".

political grounds. Therefore the *effects* of recognition are not necessarily the same for the entity concerned as the *theory* which academics and recognising states choose to attach to the process of recognition itself.

The practice can therefore be concluded to have variable outcomes depending on the political context in which it is accorded. It is variable on two levels. First in the sense that the States appear outwardly to wish recognition to seem declaratory in nature through the setting of guidelines and criteria. However, in practice they wish to override those criteria and choose in which circumstances to apply them. In some circumstances they are applied (like in Slovenia) and in some circumstances they are ignored. States thereby ensure that they retain exclusive control over recognition depending on the political scenario, even if that control is partly governed by the practice of groups of states (as in Europe).

Second, it is variable in the sense that the effects of recognition are not necessarily always identical. The consequences for a recognised entity do not have to be 'all or nothing' and depending on the will of the international community, limited personality may be accorded even if statehood is not immediately granted. Therefore the old declaratory/constitutive debate can be seen as failing to describe the process which an entity must go through before it achieves statehood. In fact, the best way to describe the situation is as a process which can vary from entity to entity.

The conclusion that the status which an entity may be deemed to possess is not necessarily reflected in its level of participation in international affairs is also supported by state practice in the form of court judgments. National courts have been willing to a limited extent to take into account the *de facto* position as well as the *de jure* status.[115]

The effects of recognition by a state or international organisation can be studied by an examination of the range of responses different representative groups have received from the international community. This will be considered in section 2 of this chapter, below. From this it will be possible to determine upon what the success of representative groups depends. This is an integral question to this thesis since it has

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[115] See section 1.2.6 above and *Hesperides Hotels Ltd. v Aegean Turkish Holidays* (1978) *QB* 205; *Gur Corporation v Trust Bank of Africa Ltd.* (1986) 3 *WLR* 583 and *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and Others: The Mary* (1993) 1 *All ER* 371. See also, Shaw, "Legal Acts of an Unrecognised Entity".

been shown that status does not only turn on which theory is attached to recognition. To summarise, since the response an entity claiming status may receive is variable due to context and politically influencing factors, it does not therefore relate directly to the result it has on the ability of the entity to play a part in the international community.

2: AN EXAMINATION OF THE RANGE OF RESPONSES RECEIVED BY DIFFERENT GROUPS WHICH HAVE MADE A CLAIM TO STATUS

The first part of this chapter has focussed on the theoretical underpinnings of recognition. This has been an important part of this study, even though it has concluded that the relevance of recognition theory to the achievement of the aims of an entity in the international community is less linked than may at first appear to be the case. The label attached to the theory given to recognition is a jaded debate. This is because recognition decisions do not necessarily result in an "all or nothing" situation for an entity in practice. States are keen to keep a certain level of discretion in recognition decisions. However this can work in an entity's favour as well as against it. This, coupled with the changing number of non-state entities on the international stage is very important. As a result of these conclusions however, the foregoing discussion does not fully establish what *does* make a difference to the level of participation a group claiming status is able to achieve in the international community.

In order to help clarify this section 2 aims to consider the range of responses that some groups claiming status have received from the international community. This will enable consideration of whether there are any common factors which can be said to influence the status of a group claiming status on the international stage.

For the purposes of this enquiry liberation movements will be examined as they are classic examples of non-state groups which seek increased personality on the international stage. Contemporary international practice appears to widely support the notion that a liberation movement may be a subject of international law.[116] However, far from all liberation movements have been or are indeed likely to be classed as such. Some of the more famous examples which are brought to mind are Western Sahara, East Timor, Palestine, Tibet, Quebec, the Kurds, the Basques, the indigenous peoples of Australia or America amongst many others. In addition there are the less internationally renowned groups pushing for self determination. For example, those in Brittany, Cornwall or Gibraltar. When these are added to the many groups which have gone before them, particularly during the colonial period, it is apparent how important, yet

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[116] Lauterpacht, "The Subjects of the Law of Nations" (1947) 63 *LQR* 438, at 444.

still unclear, the right to representation and the status of representatives is in international law.

2.1: Overview of non-state claimants to international legal personality

In this section an illustrative sample of the groups which have made claims to status on behalf of the people they purport[ed] to represent are considered. The Palestinian situation, though a good example is not included in this section, since it is the main case study used in this thesis regarding representation and will be considered fully in Chapters Two and Three.[117]

2.1.1: PAIGC

The Partido Africano da Independencia da Guine e Cabo Verde (PAIGC) was a liberation group struggling for independence in Guinea-Bissau which was a Portuguese colony. The PAIGC rebelled against the administration in Portugal, claiming to represent the people of the territory. It managed to acquire armed control over approximately two thirds of the state and then went on to declare independence in September 1973.

The PAIGC represented the people of the colonial territory of Portuguese Guinea. In a colonial situation the need for representation at an international level is clear and the PAIGC is an interesting comparative example because as will be discussed below, it demonstrates the difference which the support of an international organisation can make in the struggle for statehood.

The PAIGC declared the creation of the State of Guinea-Bissau and within a year received recognition from over 40 members of the international community. The UN resolved that a sovereign state of Guinea-Bissau had been created[118] and during the

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[117] In Chapter Three the methodology used to consider the international community's response to claims to Palestinian status is by looking at recognition by the UN, by individual states, diplomatic relations, at a regional level and lastly recognition by other groups and bodies. Similar criteria will be used in this chapter to monitor the international community's responses to the chosen groups.

[118] General Assembly Resolution 3601 (XXVIII), 2 November 1973 (Voting: 93:7:30).

following year more and more states continued to recognise Guinea-Bissau as an independent state. This resulted finally in a formal agreement between Portugal and the PAIGC.[119]

There seemed to be little doubt that the PAIGC did not exercise effective control within the territory, however this did not stop the international community effectively pushing for the creation of a state through recognition because of the denial of self determination.[120]

The first opportunity for the group to represent their people came in the Economic Commission for Africa at the UN. Portugal, which was the administering coloniser of the territory, was expelled from the Commission, so it was decided that groups recommended by the Organisation of African Unity (OAU) should be able to become Associate Members.[121] The PAIGC then went on to participate in the Special Committee on the Implementation of the Declaration on Decolonisation, although only on issues relating to Guinea.[122]

Despite the support it received, even as it was on the verge of achieving its aims the PAIGC did not achieve as much support at the UN as some other liberation groups such as SWAPO or the PLO.[123] In 1974 there were calls for the leader of the PAIGC, Amilcar Cabral, to be able to make a declaration before the General Assembly, however they were unsuccessful.[124]

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[119] See description of situation in Wilson, *International Law and the Use of Force by National Liberation Movements*, at 111 - 113.

[120] For further discussion of premature recognition due to lack of effective control of the territory see Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press) (1999), at 217 – 223. See also section 3 below regarding self determination and representative groups and section 3.2.1 regarding self determination and premature recognition.

[121] Resolutions 151 (VIII) (1967) and 194 (IX) (1969) of the Commission and General Assembly Resolution 2795 (XXVI), 10 December 1971 (Voting: 105:8:15 – Brazil, Costa Rica, France, Portugal, South Africa, Spain, UK and USA against).

[122] General Assembly Resolution 2878 (XXVI), 20 December 1971 (Voting: 96:5:18).

[123] SWAPO and the PLO were distinct from other groups in that were invited to be observers in the General Assembly in plenary session and they may participate on all issues, as non-member State observers would do: General Assembly Resolutions 152 (XXXI), 20 December 1976 (Voting: 113:0:13) and 3237 (XXIX), 22 November 1974 (Voting: 95:17:19).

[124] Although the leader of the PLO was invited to address the Assembly that same year. For discussion see Chapter Three of this thesis and Hirst, *The Gun and the Olive Branch: The Roots of Violence in the Middle East,* (London: Faber and Faber) (1977), at 333; also cited in Burke, *International Recognition of a Non-State Nation: The PLO and the UN*, (M.Phil Thesis: Oxford) (1979), at 76.

Thus the PAIGC was very successful in that it achieved its aims, but it was not necessarily given as high a profile as those African liberation groups which achieved success in the mid to late 1970s.[125] This was mainly because it was operating before the participation of liberation movements in the international arena became more common practice rather than through any ideological opposition to its aims, since this was at the height of the decolonisation process which was spearheaded at the UN. However, it is interesting to note the support which the organisation gave to the new State of Guinea-Bissau thus implicitly supporting the PAIGC.

Although forty States had recognised the emerging State, under the constitutive theory this would surely not be sufficient alone to create a State and as mentioned above the lack of control which the PAIGC had over the territory would not necessarily satisfy all the declaratory doctrine requires.[126] Therefore it can be said that the support of the UN was the key factor in bringing about the creation of the State. This is important because it shows the effect which UN backing can have on the success of a liberation movement. Arguably however, the success came as a result of the denial of self determination and the colonial situation within which the group operated, rather than through any particular characteristics belonging to the group as it was not clear how representative it was of the people whom it purported to represent. Therefore it is arguable that the *claim* to statehood must be based on sufficiently strong ground before the UN will push for independence.[127]

2.1.2: SWAPO

The South West African People's Organisation (SWAPO) fought against South Africa for the liberation of Namibia (South West Africa). Whilst this too was a colonial situation, the case of Namibia was special because it became a Class C Mandate under the League of Nations with South Africa as its mandatory power.[128] Yet, after the dissolution of the League, South Africa refused to place Namibia under UN

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[125] Travers, "The Legal Effect of United Nations Action in Support of the Palestine Liberation Organisation and the National Liberation Movements of Africa" (1976) 17 *HILJ* 561, at 569 and footnote 25 for a full list of groups.

[126] Due to the requirement under the Montevideo Convention for their to be an "effective government". See section 1.2 in Chapter Three regarding the criteria for a government in international law.

[127] The issue of the quality and effect of claims to self determination and their impact on the recognition process will be examined in section 3 of this chapter.

[128] See section 1.2.2 in Chapter Two for brief information regarding the system of mandates.

trusteeship.[129] On this issue therefore, the relationship between the mandatory, South Africa and the UN was already off to a rocky beginning. The UN's stance against South African presence was confirmed when the Security Council and the International Court of Justice stated that South Africa's continuing presence in the territory was illegal.[130] The people of South West Africa were a people desperately in need of a legitimate representative to voice their interests in the international community and SWAPO filled this role. Indeed SWAPO did often have a great deal of control over Namibia somewhat akin to a government and it certainly had a fairly high level of popular support.[131]

Recognition of SWAPO by the OAU was a turning point for the group as the Organisation was an extremely influential body in terms of raising the profile of national liberation movements generally and had provided both financial and diplomatic assistance to many of the African groups in particular.[132] As a result of this and the increasing support for situation in Namibia, SWAPO was granted observer status by the UN.[133]

The practice of the UN also shows that in some respects SWAPO and other African movements indeed led the way regarding liberation movement participation, particularly through observer status at the UN.[134] In 1972 SWAPO was given the opportunity to

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[129] For further discussion on the history of the trusteeship of South West Africa see Dugard, *Recognition and the United Nations*, at 117 – 122.

[130] See Security Council Resolutions 269 (1969) and 276 (1970) and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) *ICJ Rep.* 16, at 58.

[131] Dugard, "SWAPO: The jus ad bellum and the jus in bello" (1976) 93 *SALJ* 144.

[132] The OAU does not currently recognise any national liberation movements. The OAU is an international regional organisation which from time to time recognises liberation movements and has co-operated with the United Nations in this regard. See by way of example, General Assembly Resolution 3280 (XXIX), 10 December 1974 (consensus), whereby the UN granted observers status to "the representatives of the national liberation movements recognised by the Organisation of African Unity".
As a basic guideline, the OAU uses the criteria of effectiveness of the struggle of the movement in question but also looks particularly at the level of support which it has accrued.
As discussed in relation to the PAIGC and SWAPO, the effect that its recognition had on the process of the granting of observer status at the UN was crucial for many groups. Such recognition often marked the turning point for the internationalisation of liberation conflicts and on many occasions was a precursor to independence

[133] This occurred in 1976 by virtue of General Assembly Resolution 152 (XXXI), 20 December 1976 nearly two years after the initial invitation to the PLO to receive the privileges of the status of observer in the General Assembly.

[134] See Travers, "The Legal Effect of United Nations Action in Support of the Palestine Liberation Organisation and the National Liberation Movements of Africa", at 561. Travers lists the National Liberation Movements with observer status and OAU recognition, numbering 13, in footnote 25.

participate in the work of the UN Council for Namibia.[135] This was followed in 1973 with the grant of observer status to that Council.[136] The Council made a report on the situation in Namibia which the General Assembly considered during it's 28th Session. The report was accepted and as a result SWAPO was recognised as the "authentic" representative of the people of Namibia.[137] This was clearly a political victory for the movement and helped to cement its position as a legitimate entity in international affairs.

At that time SWAPO was one of the foremost liberation movements in Africa and this was certainly due in part to the publicity their cause had received through the channels of the UN and also to the case pertaining to Namibia which had been before the International Court of Justice a few years before.[138] The case and the Security Council decisions,[139] which had both deemed South Africa's continued presence in Namibia illegal and also required its immediate withdrawal from that territory, added weight and legitimacy to SWAPO's political aims.[140] As a corollary therefore they also added legitimacy to their claims to status which as far as they were concerned would enable them to wage an international war of liberation against South Africa.[141]

SWAPO was also recognised as a NLM by the international community through the 1977 Protocols to the 1949 Geneva Conventions which were discussed at a Diplomatic Conference in Geneva which SWAPO attended.[142] The Protocols built on the existing International Humanitarian Law, but the issues they consider which are relevant here are the status of wars of national liberation and the combatants involved in them through guerrilla warfare. It has been argued that the reference to "racist regimes" in

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[135] This was two years prior to the invitation to the PLO mentioned above which will be considered in further detail in Chapter Three.
[136] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 118.
[137] General Assembly Resolution 3111 (XXVIII), 12 December 1973 (Voting: 107:2:17 South Africa and Portugal against).
[138] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (1971) *ICJ Rep.* 16. It should be remembered that Namibia was a UN trust territory.
[139] See Security Council Resolutions 264 (1969), 296 (1969), 276 (1970), 283 (1970), 301 (1971), 310 (1972), 366 (1974) and 385 (1976).
[140] For more analysis of the legalities of the situation see Dugard, "SWAPO: The jus ad bellum and the jus in bello".
[141] It can be argued that such a claim to wage war is not sound since the Articles of the UN Charter which pertain to the use of force do not envisage a scenario outside the use of force by states, however it is also possible to put forward the argument that where there is a solid claim to self determination, wars of liberation are international rather than internal armed conflicts.
[142] See Chapter Three section 2.7.1 regarding the PLO's participation in this Conference and Chapter Five section 1.3 regarding the Geneva Conventions' applicability to the West Bank and Gaza Strip.

Article 1(4) of Protocol I relates to the situation SWAPO was in vis-à-vis South Africa and that such a term was incorporated specifically to include that scenario.[143]

SWAPO was thus a strong NLM which had received a good degree of political support on the international stage considering that it was not a state. Some of the attention it received was politically motivated; however the opportunities it gained as a result of this action no doubt had a bearing on the activities in which it was able to take part. The limited status which SWAPO achieved, notably in the UN, being a prime example.

2.1.3: FLN

The FLN was the liberation movement in Algeria in its quest for decolonisation from France. The FLN fought a long drawn out war of liberation from 1954 to 1962 and remained the representative of the Algerian people throughout.

The FLN are a good example of another liberation movement which attained a certain degree of personality in the international arena. It was afforded *de jure* recognition by some states prior to gaining independence, which raised a number of problems regarding the issues surrounding premature recognition[144] and it even concluded treaties with some.[145] The FLN took part in a number of conferences in order to attempt to bring the war it was waging against France (the colonial power) to the attention of the world. If it could gain some level of international recognition as an organisation then

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[143] Murray, "The Status of the ANC and SWAPO and International Humanitarian Law" (1983) 100(3) *SALJ* 402, at 405.

[144] For a full list of recognising States see Wilson, *International Law and the Use of Force by National Liberation Movements*, at 110 and footnote 62. See also, Crawford, *Creation of States*, at 260 and footnote 56. Premature recognition of a government as opposed to acceptance of the authority of a national liberation movement raises many problems. These are discussed in section 3.2.1 below in relation to self determination and competing claims to status and in section 1.2 of Chapter Three. Brownlie declares that "premature recognition is a classic example of a breach of the principle of non-intervention.": Brownlie, "Recognition in Theory and Practice", at 204. Premature recognition can be thought of as a breach of the principle of non-intervention, since in the context of a national liberation movement any recognition will involve a lack of recognition towards the other party regarding their competence in a particular area. However, it can be said that these problems vary from situation to situation. For example, the issues raised in a colonial context will be entirely different from those raised in the case of secession or dismemberment.

[145] For a full list of agreements signed by the Provisional Government between 1958 after its Declaration of Independence and 1962 when it signed the Evian Accords Peace and Referendum Agreement with the French Government see Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, at 338 – 339. See also, Kassim, "The Palestine Liberation Organisation's Claim To Status: A Juridical Analysis Under International Law", at 11 and footnote 51.

the war could be classed as international rather than as domestic or civil strife within French territory.[146]

The Bandung Conference in April 1955 was the first main event it attended and 29 Third World States supported the principle of self determination including independence in North Africa.[147] Although it was only an unofficial delegate at this conference, two years later in 1957 at the Afro-Asian People's Solidarity Conference in Cairo it took part as an equal to the governments in attendance.[148] The FLN was relatively successful in achieving this, particularly after the establishment of a provisional government when a Declaration of Independence was made.[149]

One of the main problems for the FLN was to show that the war was one of decolonisation not of secession. Due partly to the huge difference in culture, religion, language and history between Algeria and France despite the proximity of territory "a large number of states eventually supported the right of Algeria to independence."[150]

The FLN finally achieved its aims on 3 July 1962 when it was granted formal independence after having signed the Evian Agreements with France earlier that year.[151] It is argued that one of the main reasons for the success of the FLN in the achievement of its aims was the taking up of the issue by the UN. The FLN was operating prior to the acceptance of liberation movements as observers at the UN and it is true to say that initially the UN was not wholly happy with considering the issue, demonstrated by the removal of the Algerian situation from the agenda in 1955.[152] When it returned for discussion in the General Assembly in 1960 and 61 however, the Assembly called for negotiation "with a view to implementing the right of the Algerian People to self determination and independence...".[153] The consideration of this issue at that time was relatively controversial due to the concerns of the colonial states about precedent-setting, particularly as this was a decade before liberation movements became more involved in the work of the UN. However, it also shows the effect which the interest of

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[146] See generally, Gillespie, *Algeria: Rebellion and Revolution* (London: Ernest Benn) (1960) and Horne, *A Savage War of Peace: Algeria 1954 – 1962* (London: Macmillan Press) (1977).
[147] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 109.
[148] *Ibid.*
[149] 16 September 1958.
[150] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 111.
[151] 13 March 1962, 66 *Revue Général de Droit International Public* 686 – 92.
[152] General Assembly Resolution 909 (X), 25 November 1955 (adopted without a vote).
[153] General Assembly Resolution 1724 (XVI), 20 December 1961 (Voting: 62:0:38)

the UN can have on a situation. This is the case since after an extremely protracted conflict and nearly four years after the initial Declaration of Independence, but notably only a year after the General Assembly's Resolution, independence was granted.

The Algerian example spanned the formative years of the decolonisation process and has been chosen here as a comparator to SWAPO and the PAIGC which both operated when the notion of the recognition of a liberation movement was more widely accepted as a possibility, partly because of the significant step which parts of the international community took in recognising prematurely the provisional government set up by the FLN.

As one of the first major and more successful liberation movements to receive some international recognition, the FLN demonstrates the need for representation and indeed continued representation throughout the entire struggle for self determination. It is also an example of how the bringing of a claim for self determination is not always a speedy process and shows that there is a need for some level of status, and therefore voice, in the international community during the time of struggle as well as when self determination in achieved.[154]

2.1.4: FRETILIN

The history of East Timor is a tragic case study and to this day East Timor remains on the UN list of non-self governing territories. East Timor was a Portuguese colony and it shares an island (Timor) with Indonesia, a neighbouring state. In 1974 when Portugal gave up its claim to East Timor, Australia and Indonesia together decided that in the best interests of the security of the region East Timor should be joined to Indonesia. Fretilin, a liberation group purporting to represent the East Timorese, was formed within East Timor, aiming to secure independence and thus oppose Indonesian claims to the territory.[155]

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[154] See section 3 below regarding self determination.

[155] Fretilin stands for Frente Revolucionaria Timor Leste Independente. For descriptive information regarding Fretilin activity and fighters see Parry, "In the jungles hills of East Timor, the resistance fights on after 23 years" *The Independent* 4 November 1998 18.

In the summer of 1975 Fretilin forces managed to gain control of the territory from Portugal and went on to declare an independent state of East Timor. Later on that year Indonesia invaded East Timor and overthrew Fretilin . Portugal, who claimed to be the sole entity entitled by the UN Charter to speak for the East Timorese[156] protested at the UN and its claims were upheld.[157] In May 1976 the Indonesian Government and the pro-Indonesian political parties in East Timor created an unelected "Regional Popular Assembly" which 'authorised' the territory's incorporation into Indonesia. A guerrilla war between the two claimants to the territory ensued with much loss of life and bloodshed, notably on the side of the East Timorese.

A "popular consultation" was set up by the United Nations to take place on 8th August 1999 in order to assess the popular support for independence and a UN Mission was put in place to organise the referendum.[158] The voting took place on 30th August that year and 78.5% of East Timorese voted in favour of independence from Indonesia. However up until this UN involvement and the violence mentioned below, international interest in the situation has been fairly limited.

Tragically, following the rejection by the East Timorese of integration with Indonesia the Indonesia armed forces waged a three week campaign called "operation clean sweep" in which the majority of the East Timorese infrastructure and buildings were destroyed. Thousands of East Timorese were also brutally executed and villages were burnt.[159] As a result The United Nations Transitional Administration in East Timor (UNTAET) was established.[160]

"UNTAET is unique amongst experiments in transitional administration with full legislative and executive powers, since it is the first time the UN has assumed its role independently of any competing authority."[161]

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[156] In its capacity as the administering power of what is still considered to be a non-self governing territory by the 'Committee of 24' at the United Nations

[157] The UN has condemned the Indonesian invasion of East Timor but has not classed it as an act of aggression. The initial General Assembly Resolution after the invasion was 3485 (XXX), 12 December 1975. See also, Security Council Resolution 384, 22 December 1975.

[158] Security Council Resolution 1236, 7 May 1999 and Security Council Resolution 1246 11 June 1999 respectively.

[159] Chopra, "Introductory Note to UNTAET Regulation 13" (2000) 39 *ILM* 936. See also Security Council Resolution 1264, 15 September 1999 which welcomed the results of the referendum but was also, "deeply concerned about the deterioration of the security situation in East Timor and in particular by the continuing violence against and large scale displacement and relocation of East Timorese civilians."

[160] Security Resolution 1272, 25 October 1999.

[161] Chopra, "Introductory Note to UNTAET Regulation 13", at 937.

Fretilin is no longer fighting for independence from Indonesia. However as mentioned above, as yet East Timor has remained on the UN's list of non-self governing territories.

The level of international support received by Fretilin during its struggle with Indonesia was not great. In the Dutch case *Democratic Republic of East Timor, Fretilin and Others v State of the Netherlands*[162] the Court found that as a matter of fact the independent State of East Timor did not exist and Fretilin had "no legal personality" and that therefore the case failed on admissibility grounds. The Court took into account the lack of recognition by the international community as evidence of their non-fulfilment of the criteria of statehood and government. Fretilin submitted that prior to the case there had been a period of time during December 1975, before the invasion by Indonesia, when effective control of the territory had been exercised. The Court considered however that this was insufficient evidence to consider Fretilin to possess much status in the international community.[163]

The UN did offer some support in that during the struggle there were General Assembly and Security Council Resolutions calling for the withdrawal of Indonesia from East Timor and a call to all states that they allow the East Timorese to exercise their right to self determination[164] However, partly due to lack of real international pressure, Indonesia ignored the principle of self determination and claimed sovereignty over the area.

The International Court of Justice also had to consider the issue of self determination in East Timor.[165] The Court stated that the people of East Timor have the right to self

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[162] District Court of the Hague, 21 February 1980: 87 *ILR* 73. The Court was asked to withdraw export licences for the delivery to Indonesia of three corvettes which were to be built in the Netherlands and there was concern that they would be used in the fighting between the recipients and the East Timorese.

[163] The way that the court decided this case is interesting. The court stated that "the question was to be decided on the basis of the factual criteria for statehood laid down by international law." Evidence of failure to fulfil the criteria this could be the "non-recognition by the vast majority of states" (at 73). Therefore a declaratory yet factual approach to recognition is taken.

[164] General Assembly Resolution 3845 (XXX), (1975) (Voting: 72:10:43); Security Council Resolution 384 (1975) (Adopted unanimously).

[165] East Timor Case (Portugal v Australia) (1995) *ICJ Rep.* 90. The case was brought by Portugal on the grounds that the conclusion of a treaty between Australia and Indonesia regarding the exploration and exploitation of off-shore resources (The Timor Gap Treaty) was in violation of the rights of the people of East Timor. Portugal submitted further that the treaty was in violation of her rights as the competent authority in East Timor because she had been the colonial power in the territory prior to the Indonesian invasion in 1975. For discussion regarding Portugal's claim see Chinkin, "The Merits of Portugal's claim against Australia" (1992) 15 *U New South Wales LR* 423.

determination and that this was a right *erga omnes*, but declined, however, from deciding the case given that Indonesia was not a party.[166]

The East Timorese were clearly a people in the kind of scenario where the need for representation at an international level was acute. The East Timor problem stemmed from the demise of the colonial period but, unlike many African states, self determination was not realised. Furthermore, since that time there had been many reports of violence between the Fretilin and the Indonesian forces and a number of reports claiming that the human rights of the East Timorese were being systematically abused.[167] It is hard to deny that there was a need for a representative group in East Timor; however the effectiveness of that representation and their success as a movement on the international stage was not great.

Fretilin is a good example of a representative group to use in this study because it claims were to represent the East Timorese, who have been endorsed by the UN as having a right to self determination, but has had a differing level of success to the other groups dealt with in this chapter.

Fretilin has not been very successful in the extent of recognition it has received from the international community and therefore its impact on the international stage has always been very unclear and certainly much limited. Obviously this is very different to the situations in which the aforementioned groups found themselves, particularly given the clarity of the self determination situation and the dire need for representation which existed in East Timor.[168]

It is argued that one of the main reasons why Fretilin has received such little support is because of the lack of participation by the movement in the UN other than through support for the right of self determination.[169] Fretilin was able to appear before some UN committees, including the Special Committee on Decolonisation and the Fourth

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[166] See Chinkin, "Recent Cases: The East Timor Case (Portugal v Australia)" (1996) 45 *ICLQ* 712. The Court also refused to be drawn into a discussion regarding the consequences of a breach of the right to self determination.
[167] See for example Parry, "In the Jungle Hills of East Timor, the Resistance Fights on After 23 Years".
[168] See Cassese's explanation of the situation which is definitive about the right to self determination of the East Timorese, Cassese, *Self Determination of Peoples*, at 223 – 230.

Committee.[170] However, this was infrequent and on an *ad hoc* basis and there were no moves to grant observer status. This is partly due to the fact that it was not granted observer status by a regional organisation such as either the Arab League or the OAU and their support, as shown above in relation to SWAPO, is crucial given the framing of the relevant UN resolutions,[171] despite the fact that there is no equivalent Asian organisation.

Therefore, although the status of Fretilin during its conflict with Indonesia was unclear, it can be said that it did not have a significant impact upon the international community. This is substantially due to its lack of recognition either by individual states or international organisations such as the UN or other regional organisations. It is fair to say that this problem lies to a certain extent with the lack of a relevant regional organisation for Asia which would perform such a task. Lack of recognition however, may be as a result of the lack of availability of information as to the representative nature and thus legitimacy of Fretilin as a liberation movement due to the closed nature of the Indonesian administration. Due to lack of support for Fretilin's claims, the degree of personality it achieved was extremely minimal.

2.2: Conclusions for this section.

The examples chronicled above suggest that there is a link between political support and recognition resulting in a degree of international personality. Some of the groups were more successful on the international stage than others, (for example, SWAPO compared with Fretilin). In such cases it can be seen that the political support they received directly affected their participation at an international level (for example, SWAPO's being granted observer status in the United Nations). Although the achievement of personality is qualitatively different from gaining political support or making a political impact, the above study appears to support the assertion that politics and recognition are almost inextricably linked, particularly in the claims of non-state groups when there may be more than one claim to the relevant territory.

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[169] The UN has condemned the Indonesian invasion of East Timor but has not classed it as an act of aggression. The initial General Assembly Resolution after the invasion was 3485 (XXX) 12 December 1975. See also, Security Council Resolution 384 (1975), 22 December 1975.
[170] Shaw, "The International Status of National Liberation Movements" (1983) 5 *Liverpool LR* 19, at 32.

Due to the importance which political support plays in the achievement of status in the international community, it seems quite possible that, at any one point in time, a representative group could have more than one level of status depending on with whom it is interacting and on the level at which it is given the opportunity to participate and interact. This is important because it means that any status is potentially variable not only through time and the working through of a transitional period prior to statehood, but also through situation. Status for the representative group is therefore a politically complex web of relationships.

On examination of the groups considered above it seems clear that there can be no substitute for recognition by the UN as the legitimate representative of a people in terms of the consequences which often (although not automatically) spring from this. A subsequent grant of observer status for a liberation movement can then surely only increase its level of international legal personality due to the high level of support it received.

Recognition by and support from individual States is clearly important. Often however, formal recognition from the international community as a whole may come after the acceptance of the UN, as for example in the case of Guinea-Bissau. For the groups which achieved status at the UN, it proved to be a turning point in their struggle for independence. However, if observer status is not granted, the opportunity to participate in the work of the UN nonetheless gives liberation movements the chance to publicise their cause and mobilise support for their aims, as demonstrated by the case of the FLN.

Another important issue which relates to the success of groups is the quality of their claim to represent. This naturally includes the people's claim to self determination and the problem of competing claims to the territory. In some cases, as is evidenced above in relation to SWAPO, the need for representation due to an unfulfilled claim to self determination has been the trigger for increasing support and therefore status from the international community.[172] However as the case of East Timor shows, the call for independence does not always result in a speedy international response.

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[171] See section 2.2 above which deals with grants of observer status to liberation movements.

The small number of groups examined briefly above supports the assertion that the response of the international community to group's claiming status is far from uniform. Each group was handled in a different manner depending, for example, upon the period of time when it was operating, upon the political situation it was involved in and the competing claims to the territory. The potential range of responses from the international community seems to have a direct impact on the achievement of a group's aims and the length of time in the transitional period prior to full independence as is evidenced particularly well by the East Timor example.

All these issues lead onto the question of where the most complicated example of liberation fits into the scale of possibilities for types of responses to claims to status. The most complicated example arguably being the Palestinian situation. Chapter Three considers the range of responses it has received from the international community to its representatives' claims to status which will assist in the assessment of the theory that personality may be variable. However, before an examination of the Palestinian claim is undertaken, one more issue must be raised in order to understand both the responses which may be given by the international community and the claim to status itself.

The following section considers the issue of self determination. Self determination is here singled out above the other factors which may have a bearing upon a group's claim to status. This is because it seems that the quality of the claim may affect a group's claim and its centrality to the international community's response is of great importance.

[172] The question of self determination is considered in greater detail below in section 3.

3: SELF DETERMINATION AND ITS SIGNIFICANCE IN THE CONTEXT OF THE SUCCESS OF REPRESENTATIVE GROUPS.

This section considers to what extent the claim of a group to represent a people on the grounds of their right to self determination and the quality of that claim affects the recognition which is accorded to the representative group. The issues surrounding competing claims to territory in self determination situations will also be considered. This may assist in assessing whether self determination can speed up the recognition process and thereby reduce the transitional period between the claiming of a right and achievement of it.

From this it will be possible to establish if any criteria can be seen to emerge regarding the response of the international community to representative groups or whether their approach has been at a more *ad hoc* level. First however, the basics of the law of self determination will be considered in order to place this discussion in its theoretical context.

3.1: The claim of self determination in the international community.

Self determination has been described as,

"The right of a nation to constitute an independent state and determine its own government for itself."[173]

There is a major hurdle in the application of this argument to the current world situation if it is accepted, as some have argued, that self determination is restricted to situations of decolonisation.[174] The implication is that a need for representation as a result of a denial of self determination could only occur in a colonial context, and thus that

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[173] Cobban, *The Nation State and National Self Determination* (London: Collins) (Revised Ed.: 1965), at 45 – 46, also cited in Vance, "Recognition as an Affirmative Step in the Decolonisation Process: The Case of Western Sahara" (1980) 7(2) *YJWPO* 45, at footnote 1.

[174] See for example, Gross Espiell, *The Right to Self Determination. Implementation of United Nations Resolutions*, UN doc. E/CN.4/Sub.2/405/Rev. 1 (1980), at 10. Cf: *inter alia,* Tomuschat, "Self Determination in a Post-Colonial World" from Tomuschat (Ed.), *Modern Law of Self Determination*, (Dordrecht: Martinus Nijhoff Publishers) (1993) 1 and Cassese, *Self Determination of Peoples*. There can also be needs for representation at an internal level, however for the purposes of this study only international claims are considered. For further discussion on internal issues see, Thornberry, "The Democratic or Internal Aspect of Self Determination with some remarks on Federalism" 101; Rosas, "Internal Self Determination" 225 and Salmon, "Internal Aspects of the Right to Self determination: Towards a Democratic Legitimacy Principle?" 253, all from Tomuschat (Ed.), *Modern Law of Self Determination*.

requirements for representation in the context of self determination are dying needs. It is argued however, that this is not the case. The phrase "respect for the equal rights and self determination of peoples" can be found twice in the Charter of the United Nations, at Article 1 (2) and Article 55. However these are not linked to the notion of decolonisation which is provided for quite separately in Articles 73 and 76.[175]

Therefore, it is argued that there is still a need for representation beyond the colonial context at an international level.[176] Thus the question automatically arises as to who may legitimately claim the right to self determination. A minority within a state may be the kind of group which needs some form of representation, particularly if they are insufficiently represented within the political set-up nationally. Whether this would always fall within the wider and maybe more ambitious notions of the right to self determination is perhaps debatable, as self determination does not have to result in independent statehood.[177]

3.1.1: Representation of Whom?

When linked to the principle of self determination at first glance the answer to this question may seem straightforward. The UN Charter refers to the "...self determination of *peoples*"[178], therefore the group of individuals who require representation in a self determination situation are a "people". However, as the wealth of discussion which this word has generated suggests, the answer is far from simple.[179]

The UN practice has generally limited any form of definition to peoples under "alien subjugation, domination and exploitation",[180] "peoples under colonial and alien

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[175] See Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?" 55, at 58 from Crawford (Ed.), *The Rights of Peoples* (Oxford: Clarendon Press) (1988). Self determination is also mentioned in numerous General Assembly resolutions as a right of peoples (see for example, General Assembly Resolution 1514 [XXV], 14 December 1960 (Voting: 89:0:9. Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, United Kingdom and United States of American abstained)) and is widely discussed in literature (for a modern in depth discussion see for example, Cassese, *Self Determination of Peoples* and also Tomuschat, "Self Determination in Post-Colonial World", *ibid.*

[176] See Tomuschat (Ed.) *Modern Law of Self Determination.*

[177] See Eide, "In Search of Constructive Alternatives to Secession" from Tomuschat (Ed.), *ibid.* 139 and Musgrave, *Self Determination and National Minorities* (Oxford: Clarendon Press) (1997).

[178] Articles 1(2) and 55.

[179] See for example, Chapter III "Scope of the Principle: Definition of the 'Self'" from Pomerance, *Self Determination in Law and Practice* (The Hague: Martinus Nijhoff Publishers) (1982).

[180] Articles 1(3) of the Human Rights Covenants which are discussed in Chapter Five below.

domination",[181] and "racism, apartheid and activities of foreign economic and other interests which exploit colonial peoples".[182] Therefore, the term "colonial" "is often coupled with 'racist' or 'neo-colonial' concepts in the halls of the UN."[183]

As a result of the lack of clarity there has been some debate over how far it applies to minority groups and in particular ethnic groups within a state. The UN practice has been collectively determined as including only within its scope, "...the right of the majority within a generally accepted political unit to the exercise of power."[184] This definition still leaves the definition of the "political unit" unclear. However, as options which do not necessarily only include full independence and secession are considered in more detail, the fulfilment of the right to self determination for *all* peoples, whether considered distinct for reasons of ethnicity, culture, religion, race, or skin pigmentation becomes less of a radical political principle and more potentially achievable as the trend towards democracy in the international community grows.[185] This said, the international response to such groups whether ethnically distinct (like the Kurds, Basques or Armenians), indigenous populations (like the native peoples of North and South America, New Zealand or Australia), religious groups (like the Catholics in Northern Ireland) or linguistically distinct groups (like the Québecois) has so far been poor and dogged by apathy and inaction. This is perhaps not surprising given the initial concern about the inclusion of the term *peoples* being inserted into the UN Charter at all. Nonetheless, if and when the notion of self determination becomes a clearer and more coherent legal principle a change in response may be seen. [186]

3.1.2: Representation By Whom?

Once it is established that a particular group of people require a representative, then the issue arises as to how its representatives are chosen . Cassese has looked at this issue in relation to national liberation movements as representatives which is the kind of group

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[181] E.g.: in General Assembly Resolutions 2649 (XXV), 30 November 1970; 2708 (XXV), 14 December 1970 and 2878 (XXVI), 20 December 1971.
[182] General Assembly Resolution 2548 (XXIV), 11 December 1969.
[183] Pomerance, *Self Determination in Law and Practice*, at 15.
[184] Higgins, *The Development of International Law*, at 104.
[185] See Eide, "In Search of Constructive Alternatives to Secession" 139 and Salmon, "Internal Aspects of the Right to Self determination: Towards a Democratic Legitimacy Principle?" 253.
[186] See Cassese's description of the debate at the Dumbarton Oaks and San Francisco talks regarding the inclusion of the principle of self determination in the UN Charter, Cassese, *Self Determination of Peoples*, at 37 – 43.

primarily relevant to this study. He states that a group must have a "broad support among those it claims to represent" before it can obtain any level of status in international law as a result of its position.[187]

Basically therefore the requirement is one of legitimacy in relation to the people it purports to represent.[188] The concept of legitimacy in relation to recognition and the according of status is not necessarily a new one, since it has traditionally been considered alongside the notion of effectiveness of government which places some importance on the consent of the governed.

> "...experience showed that the principle of mere effectiveness may apply a sanction for ruthless regimes inimical to the true will of the nation...that experience has provided the origin of the practice according to which, as a condition of recognition, the will of the people sanctioning the new scheme of things must be substantially declared in an orderly way and in accordance with the provisions of the constitution."[189]

These words ring true in the context of recognition of governments and this particular quotation is referring to internal self determination. However, it can equally be applied and indeed provides a stronger case in the context of the recognition of a modern day liberation group struggling for external self determination.

The concept of legitimacy further ties the notions of representation with the principle of self determination and

> "...it remains true that the transfer of authority must be to a government which possesses the support of, and thus can fairly be said to be representative of, the people."[190]

It is not such a huge leap in legal thinking then to argue that if a government must have the support of the people, in taking over administration for that particular territory and people, then so must a representative liberation group. This is obvious given that should they be successful in their claims, the group is likely to play a large role in the forming of the new government. Furthermore, if the principles of democracy are adhered to strictly, it must also be argued that a people, even when (and perhaps,

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[187] *Ibid.*, at 166.

[188] Legitimacy in general has received a reasonable amount of attention in international law in recent times. See for example, Roth, *Governmental Illegitimacy in International Law*; Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press) (1990); Franck, "The Emerging Right to Democratic Governance" (1992) 86 *AJIL* 46 and Murphy, "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 *ICLQ* 545. See also footnote 19 of Chapter Three for more discussion of Murphy's article.

[189] Lauterpacht, *Recognition in International Law*, at 116.

[190] Crawford, *Creation of States*, at 220.

particularly when) struggling for self determination should be represented by a group which has the support of the majority of those of whom it claims to represent.[191]

An equally good argument for the liberation group requiring the support of the people it claims to represent is a straightforward one. Quite simply, if that group is able then to speak on behalf of the people and particularly if it takes part in international organisations or decision-making processes regarding the issue of self determination of those people, then without the support of the people the principle of self determination itself is devalued.

A further issue in addition to legitimacy regarding who is entitled to represent a people is that of competing claims to represent a people by different groups. There seems to be no reason why more than one group cannot take on this task as it may even assist in the achievement of the people's aims if different ideological groups appeal to different sectors of the international community. [192] In the practice of international organisations such as the UN however, whilst it is by no means submitted that only one group should be permitted to assert its rights to represent a people, it has generally been accepted that each state or people should be represented by one group – usually the government of that particular state or the representative of that particular people. It would be very difficult, given the procedures of that organisation to institute alternative regulations regarding peoples struggle for liberation and their representatives. Were such a situation of multiple representation to materialise the position of the peoples and their representatives vis-à-vis the powers whom they are struggling against could potentially be weakened, as it is arguable that support may be spread more sparingly between the different representatives, unless as mentioned above they were sufficiently ideologically distinct.

A further issue which should be considered here is exactly what the concept of being able to represent a people who are not the main inhabitants of a state means. Since it is the defined *people* which the representative group can claim to represent not the territory, its ability to represent beyond that mandate is automatically limited for it draws its legitimacy from the relevant people. Therefore if the group is able to join in

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[191] See also, Roth, *Governmental Illegitimacy in International Law* in relation to legitimacy generally but notably chapter 6 regarding the linking of legitimacy and self determination.

any international organisations or conferences it is the views of the people which it may voice, not views in relation to the formal administration of the territory.[193]

In order to answer the questions regarding the bearing which self determination has on the success of a group claiming status an examination of the importance of the quality of the claim to self determination is now undertaken.

3.2: The quality of the claim to self determination

Since, as discussed above, the principles of self determination and representation are inextricably linked, it seems quite logical to argue that the quality of the claim to self determination must have some impact on the willingness of the international community to recognise a representative group and encourage its participation in international organisations. The extent to which this is true however is debatable. The quality of the claim is important in that it must be seen to come within the notions of self determination of peoples in international law, rather than as protection for minority groups which would not generally come within the scope of the definition of 'peoples' given above in section 3.1.1 and would therefore be related to internal self determination. Nonetheless, there are cases where the right to self determination is apparent, yet the claim has been unsuccessful, suggesting that the quality of the claim is not the sole crucial factor and that even with an extremely strong case, recognition of the representatives is far from automatic.[194]

However, the quality of a claim is also affected by any competing claims to territory, perhaps from the administering, colonial or parent state. It could be submitted that when a claim is based on a well-founded right to self determination that such a right should take priority in legal terms. However, state practice has shown this not to be the case,

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[192] "...it is clear that this representation of a people does not preclude other movements from representing the same people.": Wilson, *International Law and the Use of Force by National Liberation Movements*, at 121.

[193] *Ibid.*, at 122.

[194] As for many years in East Timor for example. In East Timor it has been suggested that one of the reasons for lack of achievement of the right to self determination was due to the fact that the international community did take note of "effectiveness" and the reality of the situation (i.e.: The *de facto* annexation by Indonesia). This meant that the possibility of putting into practice the concept of non-recognition of illegal regimes was not sufficiently explored in that situation, see Cassese, *Self -Determination of Peoples: a Legal Reappraisal*, at 229 – 230 and footnote 34. That is not to say that the international

since what concerns many states, when a new state is emerging under the principle of self determination, is the issue of counter claims.

This was demonstrated in President Bush's letter to President Gorbachev regarding the position of the Soviet Union and its disintegration.[195] This is a concern for recognising states since they often do not wish to recognise an entity prematurely and risk intervening in the internal affairs of the parent state. This is probably one of the main reasons for the lack of recognition which most secessionist entities receive as territorial integrity and sovereign rights have consistently over-ridden such claims.[196]

There are nonetheless some examples where states have refused to recognise an entity if it would result in the denial of self determination to the population and thereby demonstrated their commitment to the principles of self determination where the claim is undeniable.

In the case of Southern Rhodesia the international community refused to recognise the white minority ruling government of Ian Smith because it violated the right of the a black majority to freely determine their own government. The regime was almost universally condemned by the UN[197] and the Security Council called on all states "not to recognise this illegal racist minority regime".[198] The wording of the Security Council statement ably exemplifies the sentiments of the international community in that instance and the action it was prepared to take. This situation also shows that the discretion which states exercise in recognition should still be in accordance with basic principles of international law and that the states in this situation clearly intended their non-recognition to be partially constitutive in nature.

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community always shies away from the possibility of non-recognition, see for example the situation in Rhodesia mentioned below.

[195] See section 1.2.4.1 above regarding the Baltic States and President Bush's letter.

[196] Consider the minimal recognition given to the Turkish Republic of Northern Cyprus, (See, Kingsbury, "Claims by non-State Groups in International Law", at 487) or the failed attempts at secession in Katanga in 1961 or Biafra in 1967 – 70: see Berny, "La sécession de Katanga" (1965) *Revue Juridique et Politique 'Indépendence et Coopération'* 563; Wodie, "La Sécession du Biafra et le Droit International Public" (1969) *Revue Général Droit International Public* 1018 and Kamanu, "Secession and the Right to Self Determination: An OAU Dilemma" (1974) 12 *JMAS* 355. Bangladesh was an example of successful secession. However, it may be argued that, given that the territory was not physically attached to Pakistan, the right to territorial integrity was not violated in its normal sense.

[197] General Assembly Resolution 2024, 11 November 1965 (Voting: 107:2:1).

[198] Security Council Resolution 216, 12 November 1965 (Voting: 10:0:1), at para. 2.

If states are willing to uphold the right to self determination in this way, there seems to be no logical reason why recognition should not be accorded more speedily when the right is clear. Obviously as shown above this can be complicated by competing claims, however in principle this reasoning should still stand. This issue is generally known as premature recognition of the state in order to fulfil the right to self determination and is considered in the following section.

3.2.1: Premature recognition & self determination

The existence of a right to self determination is also important to questions of recognition, in the sense that in some situations it is possible to see that the thresholds at which recognition is sometimes granted will be lower than in comparable situations where the right is not evident.

One of the traditional criteria for the recognition of governments has been that of effective control over its state.[199] It has already been shown that in the example of Bosnia Herzegovina a state came into being because the international community willed it even though its government was not yet fully effective. Section 2.1 also provided similar examples in Algeria[200] and in Guinea-Bissau[201] where a struggle for liberation by a movement which set up a provisional government resulted in premature recognition by States or the UN followed by States (respectively) before it had effective control over the whole territory.

This shows that, in circumstances where the right to self determination is clear, recognition can validly be accorded prior to full independence. This action will not necessarily result in it being classed as premature since the need for self determination has the effect of lowering the required threshold of effectiveness. This reaffirms the point that through recognition states can uphold a claim to independence which may in some areas seem weak at that time. Therefore recognition can effectively shorten the transitional period prior to full independence. This is evidence of the importance which

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[199] See, Peterson, "Recognition of Governments Should not be Abolished" (1983) 77 *AJIL* 31; Roth, *Governmental Illegitimacy in International Law*, at 137 – 142.
[200] See section 2.1.3 above and Wilson, *International Law and the Use of Force by National Liberation Movements*, at 110.
[201] See section 2.1.1 above and General Assembly Resolution 3601 (XXVIII), 2 November 1973 (Voting: 93:7:30).

recognition can play in situations of self determination and the influence which it exerts over the whole scenario. This restates the fact that the will of the international community, demonstrated through recognition, is an extremely strong force and its value should not be underestimated. It also exemplifies the fact that there is little substitute for a strong claim to self determination being at the centre of a group's claim to status.

CONCLUSIONS

There are three main conclusions to be drawn from the discussion above.

First, in the recognition of states there appears to be a gap between the theory of recognition and the effects of the practice of states.

It is submitted that the approach of states to the emergence of new states has been on a relatively *ad hoc* basis and that states are keen to exercise their discretionary powers in relation to recognition. This has meant that the context, the political situation and the realities of the situation have been influencing factors in decision making regarding recognition. In practice it has also meant that states have not been willing to follow theoretical concepts, even when they are based on criteria specific to those actual situations. They have therefore adopted a variable approach where the theory behind the recognition process has not always been wholly linked to the final result for the emerging state. As far as international law is concerned, there is a wide range of responses which can occur when an entity claims status on the international stage. Therefore the debate as to whether recognition is constitutive or declaratory is somewhat jaded. States make their own decisions as to whether or not to recognise and then do not necessarily follow their decisions in practice. The declaratory/constitutive debate can be reconciled therefore by admitting that neither description is that close to the reality of international life. The result of international practice is that personality is not necessarily 'all or nothing'. An entity does not have to be recognised as a 'state' or 'nothing at all', it could rest somewhere in between.

Second therefore, when these ideas and conclusions are compared to situations of representative groups rather than States, it can been seen that a similarly *ad hoc* and variable approach has been taken which has also been very dependent on the realities of the situation being considered. The international community has a range of responses to an entity claiming status which do not necessarily all have to be the same. At any one point in time representative groups can therefore have varying degrees of status. For example depending on whether they are acting as an observer in the UN or attempting to woo a politically indifferent state to the needs of the people they purport to represent.

This is interesting since it attempts to take the personality debate a step further by describing personality as a process which develops as the status of an entity changes

both from moment to moment and from situation to situation. The 'process' provides, to some degree, a solution as to the 'all or nothing' syndrome of the old debate.

However, even within the process there are significant events which affect status in the international community. For example, it is true to say, that once the international community had found a suitable method of providing a forum for liberation movements to express the views of the people they purported to represent, that formula was used on a regular basis. The grant of observer status at the UN was an effective arena for both the liberation movement to make their claims and the international community to consider them. Nonetheless, in obtaining such a grant, liberation movements had firstly to have fulfilled the criteria of being the legitimate representative of their people and also to have been recommended by either the Arab League or the OAU as such. In colonial situations this was often easier to achieve as in addition, the right to self determination, which as shown, plays a vital role, was more apparent and well supported by many States.

This leads to the third main conclusion which can be drawn from this chapter. Whilst the value of a strong claim to the right to self determination cannot be underestimated, situations like that in East Timor prove that it cannot be relied on in a vacuum and that States may require heavy proof of legitimacy in representation. The requirements can alter depending on context and political motivation, perhaps due to competing claims to the territory. Furthermore, States do not always wish to involve themselves at the risk of upsetting the doctrine of territorial integrity when claimed by a competing State.[202] It should be noted however that a strong claim to the right to self determination may assist in lessening the impact of any competing claims. The international community is keen to retain its discretion in recognition and as a result it ultimately governs the actors on its stage. It does this by varying the criteria for recognition depending on the realities and political scenario with which they are faced. Recognition is thus still to be highly prized by the representative group because of the effects it can have on their ability to participate albeit at a limited level. Indeed, the control and discretion which the international community has exercised over the recognition and success of representative groups has been great.

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[202] This demonstrates the importance that the political scenario plays in each situation as factors like the recognising state's political leanings or the international community's relationship with the "parent or administering" State may determine whether, or at least when, recognition is granted. This will be

Given the wide range of responses to claims for status the question is then raised as to where Palestinian claims fit on the scale possible responses. Exactly how variable has the international community's reaction to the Palestinian situation been? Since it is asserted that the acquiring of status is a process through which non-state entities must travel, it is suggested that an examination of the Palestinian situation will be very instructive because it has had and continues to be involved in a very long transitional phase. There are other situations which could have been chosen to use as a case study, however as one of the most complex and laden with political and religious factors, Palestine should prove to be helpful in casting light on some of the assertions made here. Thus the following chapter provides a background to the Palestinian situation in order to place the discussion in factual context and then international community's response to Palestinian claims will be examined in Chapter Three.

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evident particularly in Chapter Three where the Palestinian Representation is considered, since traditionally this has been a extremely politically divisive and controversial issue.

CHAPTER 2

THE BACKGROUND TO THE PALESTINIAN QUESTION AND THE PALESTINIAN CLAIM TO SELF DETERMINATION

INTRODUCTION

Chapter One has considered the nature of personality and some of the range of responses that the international community may have to entities claiming status on the international stage. As a result of this examination the theory that personality may be variable in nature has been asserted. It is important that this theory is examined in practice. Therefore, in preparation for such an analysis, this chapter seeks to provide an introduction to the Palestinian situation and also deals with questions as to the representation of Palestinians in the West Bank and Gaza Strip. This lays the foundation for an examination of the international community's response to claims of Palestinian status in Chapter Three.

In this chapter the background to the Palestinian question will be considered first. Without this initial discussion it would be difficult to make any judgements about the claims brought by the Palestinian Representation to the international community in pursuance of the rights claimed on behalf of the Palestinian people.

The story of the Palestinian Representation is intertwined with the history, politics and religious dimensions of the Middle East and in places this chapter will put that story in those contexts in order to gain a better understanding of the situation as a whole. Therefore historical background discussion will mainly form the first part of this chapter.

Second, the discussion will turn to the Representation of Palestinians in the West Bank and Gaza Strip in order to clarify who is attempting to bring a claim of status on behalf of those Palestinians.

Once the background to the question of Palestinian representation is explored it will become possible to ask whether the Palestinians as a people have a right to self determination. This will form the third and last main section of this chapter. As discussed in the previous chapter, the quality of such claims are important as they may have a large impact on the success of a group and their claim before the international community.

1: THE BACKGROUND TO THE PALESTINIAN QUESTION

This section aims to provide an overview of the historical background to the Palestinian situation. Given the complex nature of this task, the section is split into subsections which deal with events chronologically. This section does not aim to provide a fully comprehensive description of the Palestinian situation, particularly in relation to its early history, as these topics, whilst interesting, have less bearing on the current situation than more recent historical events. Furthermore, the complexity of the history provides the potential for vast debates on numerous issues. These are avoided here however in order to raise briefly the salient historical points which have affected any Palestinian claims to statehood.

It should be pointed out initially that politics have played a huge role in the creation of the "Palestinian problem". Before a journey through the historical background to the Palestinian question is embarked upon therefore, a pen-portrait of the main relevant political influences is undertaken.

1.1: Political influences

This thesis does not attempt to take on the daunting task of analysing the political nuances of the situation as this is an area worthy of much research on its own. However whilst the background to the issue is considered it is also important to remember that politics are germane to the situation because of the history, mixture of peoples and

international influences which have all had a bearing on the shape of the Middle East. Therefore all should continue to be borne in mind throughout the thesis.[1]

The first main political issue to note is that the creation of the State of Israel was opposed by all the existing Middle Eastern States in the United Nations as the Arab States did not relish a Jewish State as a neighbour.[2] The birth of Israel meant that for the first time there was a Jewish State within a traditionally predominantly Muslim region. The territory of Israel and Palestine also contain a number of holy places to Jews, Christians and Muslims (notably within Jerusalem itself) which adds fuel to the fire of the religious political lobbies.[3]

That said, Israel's relationship with many of her Arab neighbours has improved greatly since 1948.[4] Peace treaties with Jordan and Egypt have been concluded and it is possible that Syria and maybe Lebanon will follow.[5] However, the Arab states are naturally more likely to take a pro-Palestinian viewpoint than an Israeli one when considering their positions on the status of Palestine.[6]

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[1] There is much general literature on the Middle East. For example see, Long & Reich (Eds.), *The Government and Politics of the Middle East and North Africa* (Oxford: Westview Press) (1995); Aburish, *A Brutal Friendship: the West and the Arab Elite* (London: Indigo) (1998); Benin & Stork, *Political Islam* (London: I.B. Tauris) (1997); Nettleton & Ochsenwald (Eds.), *The Middle East: A History* Vols. 1 & 2 (New York: McGraw-Hill) (1997) and Ovendale, *The Longman Companion to the Middle East Since 1914* (London/New York: Longman) (1998).

[2] General Assembly Resolution 181 (II), 29 November 1947 (Voting: 33:13:10 Those States against were mainly Arab or South American with the addition of Greece, Haiti and the Philippines).

[3] For example, The Temple Mount, The Church of the Holy Sepulchre and Haram al-Sharif. The issue surrounding ownership of territory around religious sites and access to them is one of the issues that goes to the heart of the conflict. This study does not attempt to answer questions regarding the title to holy sites in Israel and Jerusalem as this is a huge area for research independent from the questions raised here. For further discussion however, see England, "The Legal Status of the Holy Places in Jerusalem" (1994) 28 *Is. LR* 589; Wasserstein, "Have some guts, British Jews" *Independent on Sunday* 11 February 2001 and Hadi, "The Religious Significance of Jerusalem" *Palestinian Society for the Study of International Affairs*, http://www.passia.org/jerusalem/publications/Documents_on_jerusalem.htm. See also Articles 31, 32 and 33 of the Palestinian Draft Basic Law which provide for freedom of belief and worship and freedom of access and visit to holy places and religious buildings, Annexed to Cotran and Mallat (Eds), *The Arab-Israeli Accords: Legal Perspectives* (London/The Hague/Boston: Kluwer Law International) (1996).

[4] That said, in recent months the Arab/Israeli relationship has deteriorated somewhat and there has been sporadic, but heavy violence. See section 1.2.4 below.

[5] The road to true peace between Israel and her Arab neighbours has recently been thrown into question given the increased hostilities between Israel and the Palestinians of the West Bank and Gaza Strip as this has once again fuelled the original rivalries and resentment of Israel in the Arab World. The Jordan/Israel Peace Treaty was signed on 26 October 1994. The Egypt/Israel Peace Treaty which followed the Camp David Accords of 1978 was signed on 26 March 1979. Israel's occupation of South Lebanon formally ended on 24 May 2000 and there was a strong American push for a Syrian peace agreement throughout 2000.

[6] See, "The PLO and the Arab State Relations" chapter 4 from Lähteenmäki, *The PLO and its International Position (Until the Palestine National Council of Algiers in November 1988)*, Turun Yliopiston Julkaisuja Annales Universitatis Turkuensis (Finland: Grafia) (1994); McLaurin, "The PLO

In the United Nations and at an inter-state level during the Cold War, international policy towards the question of Palestine was very much shaped by the two Super-powers. The United States has traditionally adopted a pro-Israeli approach in dealing with Middle Eastern issues. This is partly because of the strong Jewish political lobby in the United States which presses for US support for Israel, however this is also balanced with the need for access to oil.[7]

More recently other factors, like the punitive measures the United States has taken against "rogue" Arab nations, have also played a role in the United States attitude to the situation in the region.[8] However, United States policy is also affected by the political realities of its relationship with the Israeli government and the tactics of the PLO.[9]

Although the United States and the Former Soviet Union traditionally had different spheres of influence, meaning that relationships between the Arab regimes and the USSR were generally friendly, the USSR's attitude towards Palestinian Resistance and representation has not always been positive. Prior to the PLO's renunciation of violence the Soviet Union tended to support other more progressive Arab States in the struggle

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and the Arab Fertile Crescent" from Norton & Greenberg, *The International Relations of the PLO* (Edwardsville: Southern Illinois University Press) (1989) 12 and Chapter 5 from Kirisci, *The PLO and World Politics: A Study of the Mobilization of Support for the Palestinian Cause* (London: Frances Pinter Publishers) (1986).

[7] For more discussion on the United States attitude towards the Palestinian situation see, Watkins, "The unfolding US policy in the Middle East" (1997) 73 *Int. Aff.* 1 and Slonim, *Jerusalem in America's Foreign Policy 1947 – 1997* (The Hague/London/Boston: Kluwer Law International) (1998). It can also be noted that much popularist Western attitude may be misinformed and ignorant, see comments by General Odd Bull, Chief of Staff of the UN Truce Supervision Organisation from 1963 – 1970, "An uncritical acceptance of the Israeli point of view in all its aspects was the rule...": Bull, *War and Peace in the Middle East* (London: Leo Cooper) (1973) at 126.

[8] For example, cutting of diplomatic ties with Libya as a result of the Lockerbie Bombing, action against Iraq in the Gulf Conflict in 1991/92 and NATO enforcement action against Iraq in 1998. See, Watkins, "The Unfolding US Policy in the Middle East".

[9] After the assassination of Yitzhak Rabin, the new Government of Binyamin Netanyahu was not as popular at the White House and a new relationship was forged between the Americans and the Palestinians, culminating in a visit by President Clinton to the Gaza Strip in late 1998. The former Israeli Prime Minister, Mr Barak, made a number of diplomatic visits to Western European States and the USA in order to cement relationships (see, Macintyre, "Clinton Dreams of Glory From Barak Accord" *The Times* 16 July 1999 16 and Tanner and Cockburn, "Barak calls on Blair to back peace" *The Independent* 22 July 1999 13). It remains to be seen how the new Israeli premier, Ariel Sharon deals with foreign relations and how the US/Israeli relationship develops. It can already been seen however that the US is willing to take a firm hand with the new Israeli administration. For example, in late April 2001the Israeli military return to some of the PA controlled areas was strongly advised against by the US and as a result Israel pulled out of the areas it had temporarily taken over – see Adams, "Excessive and Dissproportionate" 648 *MEI* 20 April 2001 1. For discussion regarding Sharon's victory see, Kidron, "The Fruits of Victory" 644 *MEI* 23 February 2001 4 and Baram, "The Worst Man Won" 644 *MEI* 23 February 2001 7.

against Israel, such as Egypt under President Nasser.[10] However, this was mostly an attempt to prevent full scale war from breaking out as were this to occur it would have been difficult for either super-power to avoid involvement.

With the thawing of the Cold War many commentators thought that the time for peace had truly come since the deadlock in the international community which had helped the process to stagnate was at an end. [11] However, whilst this seemed possible for a while and as the PLO was able to increase its international position, internal changes in the Israeli government during the Netanyahu government once again created a stand off between themselves and the Palestinian Representation.

Since the end of the Cold War in particular, the European Union has taken an interested role in the Middle East but their support for Palestinian Statehood was recently set out more specifically. European Union leaders at an EU summit in Berlin in March 1999 declared the "continuing and unqualified Palestinian right to self determination, including the option of a state". The EU also stated that member states are "ready to consider the recognition of a Palestinian State" and that they "look forward to the early fulfilment of this right."[12]

African and many Asian States have also traditionally supported the Palestinian Representation in their quest for self determination. This support only really came after the 1967 war but this was coupled with the ending of much of the colonial period in African history.[13] Therefore, due to the large number of African States which had to undergo a similar struggle for self determination, their solidarity with other peoples in this position was undeniably strong. As the complexion of world politics changed and the balance of power, particularly in the United Nations General Assembly changed, this support became extremely important and an analysis of voting patterns shows that it has very much influenced the status of the Palestinian Representation at an international level.[14]

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[10] Nassar, *The PLO: From Armed Struggle to Declaration of Independence* (New York: Praeger) (1991), at 158.
[11] Alting von Geusau, "Breaking Away Towards Peace in the Middle East" (1995) 8 *Leiden ILJ* 81.
[12] Islam, "Europe Declares" 597*MEI* 9 April 1999 9.
[13] The 1967 war is discussed below in section 1.2.4. See also Kirisci, *The PLO and World Politics*, at 89.
[14] See table 6.6 on page 85 of Kirisci, *ibid.*

Whilst this has still been a rather lengthy "brief" look at the political issues which can influence the Palestinian situation and the international community's response to it, it is submitted that this is the minimum number of points which need raising in order to demonstrate that politics underlie much activity in the Middle East. These influences are reflected in the reactions of the international community throughout the rest of this and the following chapters.

The discussion can now move on to examine the Palestinian story in chronological order.[15]

1.2: History

1.2.1: Pre-1922

Before the birth of Christ, Jerusalem and the surrounding areas were besieged by a number of different rulers: Assyrians, Philistines, Arabs, Syrians, Babylonians, Egyptians, Persians and Greeks in 332 AD.[16] The earliest known inhabitants are Canaanites who settled there around 3000 BC.[17] They, together with the Philistines and Israelites, were the peoples who are written about in the Old Testament of the Bible and they most likely originated from Illyria. [18]

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[15] For a constitutional history of Palestine see, al-Qasem, "The Draft Basic Law for the Palestinian National Authority During the Transitional Period" chapter 6 from Cotran and Mallat (Eds), *The Arab-Israeli Accords*.

[16] Hyamson, *Palestine Old and New* (London: Methuen) (1928), at 76, cited in Cattan, *The Palestine Question* (London: Croom Helm) (1988), at 5.

[17] Cattan, *ibid.*, at 3. See also Tubb who would date the occupation of the Levant area as far back as the 8th millennium BC: Tubb, *Canaanites* (London: British Museum Press) (1998) – this conflicts with Cattan's dating which suggests that the Canaanites arrived in the area around 1175 BC.

[18] Who probably came to Palestine in the latter part of the second millennium BC, around 1175 BC – *ibid.*, at 3. In 587 BC the Kingdom of Judah was captured by the Babylonians and the Jews were sent into captivity in Babylon. Judah was one of the two Jewish Kingdoms, the other called Israel. These Kingdoms which had previously been unified during the rule of King David (1006 to 972 BC) were split after the death of King Solomon (King David's son who ruled from 972 – 932 BC). However, both Kingdoms fell. Israel collapsed at the hands of the Assyrians in 721BC and in 587 BC the Babylonians burned Solomon's Temple in Jerusalem which signalled the end of the Kingdom of Judah.

In 63 BC the Romans invaded and did not leave until the 7th Century. After that yet more changes in rulers came including the Muslim Arabs[19], the Crusaders[20] and the Turks[21]. Then in 1517 Ottoman rule came to the area.[22] Due to the number of times the Palestinian area was conquered, Palestinians do not necessarily make any claims to racial purity, indeed they do have somewhat diverse ethnic origins.[23] However, there have been those of Palestinian origin living within the territories of Israel and the Middle East for thousands of years.

The Ottoman rule lasted for much of the latter half of the second millennium, but in the nineteenth century the Empire began to crumble.[24] When the likelihood of the Empire's disintegration began to grow during the First World War, the Entente Powers began to negotiate over the allocation of the relevant Arab territories.[25]

The Sykes-Picot Agreement,[26] which was created through negotiations between Britain, France, Russia and also Italy, made clear that there would be recognition of an independent Arab State or of a confederation. This was partly because of the surge in Arab Nationalism which was challenging the Ottoman rule. Indeed this was taken further by Great Britain, who began to make promises of Arab independence for after victory in the war.

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[19] There were two periods of Muslim Arab control – directly after the Romans and then again between the Crusaders and the Turks.

[20] For further discussion regarding the Crusades see Hillenbrand, *The Crusades: Islamic Perspectives* (Edinburgh: Edinburgh University Press) (1999). See also, Runciman, *A History of the Crusades* Vols. 1 2 & 3 (London: Penguin) (1971).

[21] The Turks kept control until 1517 other than for a short period in the thirteenth century when the German, Emperor Frederick II liberated the Jerusalem.

[22] See Tannous, *The Palestinians* (New York: I.G.T.) (1988); Inalcik, *The Ottoman Empire* (London: Weidenfeld and Nicolson) (1973); Karpat (Ed.), *The Ottoman State and Its Place in World History* (Leiden: E.J.Brill) (1974). See also Brown (Ed.), *Imperial Legacy: The Ottoman Imprint on the Balkans and the Middle East* (New York: Columbia University Press) (1996) for a range of discussion on *inter alia* the economic, political, religious and linguistic effect of the Empire on the Arab World.

[23] Gilmour, *Dispossessed: The Ordeal of the Palestinians 1917 – 1980* (London: Sidgwick & Jackson) (1980), at 20. See also, Rodinson, *Israel and the Arabs* (London: Penguin) (1968).

[24] See Palmer, *The Decline and Fall of the Ottoman Empire* (London: John Murray Publishers Ltd.) (1992).

[25] The Sykes-Picot Agreement, 16 May 1916, dealt with the allocation of Ottoman Arab territories. At the outset an international régime was suggested for Palestine, because of the various places of religious importance in the area. This however did not transpire. The Arab peoples were somewhat concerned about the Sykes-Picot Agreement and what it meant for their independence, so a message was sent from the British Government to Sherif Husain on 4 January 1918. It stated that the Arab peoples would be given "full opportunity of once again forming a nation in the world" and also that in the case of Palestine "no people shall be subject to another". For more discussion regarding the Sykes-Picot Agreement see Chapter I, part I A, 13 – 17 of Temperley (Ed.), *A History of the Peace Conference of Paris* (London: Henry Frowde & Hodder Stoughton) (1924) Vol VI.

[26] 16 May 1916, see Temperley, *ibid.*

The British Authorities corresponded with the Arab people through Sherif Husain (the Emir of Mecca).[27] He thus acted as their representative, even though he did not actually have any political authority over all Arabs. These correspondences stated that, "Great Britain is prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca."[28]

When considering the administration and governance of the area the emphasis at that time was much more linked to the distribution of territory and an intention to create European influenced areas, rather than to democracy and the wishes of the people living in the territory. The fact that the European powers made contact through the Sherif of Mecca demonstrates that they intended to stir up anti-Ottoman sentiment. However it can be suggested that they also realised that sovereignty would remain with the rulers and people of the Middle East, rather than in their hands.

The need for Arab consent grew and the French and British governments later stated that that,

> "The object aimed at by France and Great Britain in prosecuting in the East the War let loose by the ambition of Germany is the complete and definite emancipation of the [Arab] peoples and the establishment of the national governments and administrations deriving their authority from the initiative and free choice of the indigenous populations." (7 November 1918).

This shows that the Europeans were aware of the emerging political notion of self determination. However, it was very much in its infancy and related much more to the concepts surrounding internal representation for the people of Palestine, rather than to the external question of Statehood which is at the heart of the issue of Palestinian Representation today.[29] This came at a similar time to the prominence of the principle of self determination as propounded by the American President, Woodrow Wilson, which was yet to evolve into the principle as is meant in today's terms.[30]

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[27] These correspondences are known as the Hussain-McMahon correspondence after the Emir and Sir Henry McMahon (the British High Commissioner in Egypt).

[28] British Government, Correspondence between Sir Henry McMahon and Sherif Hussain of Mecca, Cmd. 5957 (1939) 50.

[29] *The Origins and Evolution of the Palestine Problem: 1917 – 1988* Part I The Department of Palestinian Rights, United Nations: http://www.un.org/Depts/dpa/qpal/DPR_pp_1.htm

[30] See section 3 below and also Pomerance, "The United States and Self Determination: Perspectives on the Wilsonian Conception" (1976) 70 *AJIL* 1.

However, at this time the promises made to the Arabs were not the only political factors at play. The root of the Palestinian problem lies in the competing claims to territory of the Palestinians and the Jews. Although not a new concept, the Jewish claim to Palestine was pushed at an international level particularly from the late 18th Century onwards by Theodor Herzl,[31] notably as a result of anti-Semitism in Europe and the massacres of Jews in Russia and Poland.[32] But without a greater number of Jews in Palestine than there were at the turn of the Century (approximately 50,000 compared with well-over half a million Palestinians), Jewish settlement there held insufficient political or legal weight to be realised. [33]

Some Zionists were keen to take a more careful approach to the adoption of Palestine as the Jewish national homeland, due to concerns about the rights of the Palestinians.[34] Nonetheless, the pleas fell mainly on deaf ears and the Organisation continued mobilising support for their aims.

The question of Palestine in external self determination terms was complicated yet more, and for good, through the contradictory approach taken by the British Government towards the issue. At the same time as making assurances to the Arabs through the Sherif of Mecca it also began to make promises to the World Zionist Organisation about the establishment of a Jewish National Homeland in Palestine. Lord Balfour, the British Foreign Secretary sent a letter to Baron Rothschild which provided that:

> "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of the object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country."[35]

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[31] Founder of the Zionist Movement.

[32] Initially, Herzl considered both Palestine and Argentina in his quest to find a suitable Jewish homeland. However, in 1897 the first Zionist Congress in Basel, Switzerland declared that Palestine was the preferred choice. Unfortunately for his cause, the Ottoman authorities rejected his plans but various Western European Governments suggested places such as Cyprus, East Africa and the Congo, although they were not adopted. Despite lack of initial international support at an early stage the goal of the Zionists was clear: the creation of a Jewish State in Palestine.

[33] See, *The Origins and Evolution of the Palestine Problem.*

[34] For example, Ahad Ha'am. See, Kohn, "Ahad Ha'am: Nationalist With a Difference" from Smith (Ed.), *Zionism: The Dream and the Reality* (New York: Harper and Row) (1974).

These two contradictory statements by the British government paved the way for strife in the area. Both Jews and Arabs believed that they had a right to external self determination in Palestine and to form their own state. Indeed the crucial role which the Balfour Declaration has played in the question of Palestine should not be underestimated, particularly as a result of its inclusion in the League of Nations Mandate for Palestine.[36] At the time of the Declaration there was much debate regarding its meaning and what implications it had for both Jews and Palestinians.[37] The British Government made several drafts of the Declaration before the final wording was agreed upon. In the end it received criticism from Jewish and non-Jewish and circles.

One of the main Jewish critics was Sir Edward Montagu who was British Secretary of State for India and a prominent Jew (the only Jew in the British Cabinet at the time). His opinions were made clear to the Government in secret Cabinet memoranda which have since been made public.[38] In them he disagreed with Zionist aims due to his belief that Judaism was a universal faith rather than a description of nationality. He also considered that Zionist claim to speak on behalf of all Jews was flawed. He believed that should a Jewish State be created, Jews that did not emigrate there would be denied the privileges and liberties they received as regular citizens of the States where they currently resided and thus be classed as outsiders. Montagu, further stated that although Palestine played a large role in Jewish history, it was equally important to the Muslim and Christian faiths and denied "...that Palestine is today associated with the Jews or properly to be regarded as a fit place for them to live."[39]

Montagu's suggestions were left unheeded however, and Lloyd George, the British Prime Minister made clear that when the time came to create representative institutions in Palestine, if the Jews had a sufficient majority within the area, then statehood would be afforded them.

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[35] Letter from Foreign Secretary, Sir Arthur James Balfour to Lord Rothschild, 2 November 1917. For a full historical account of Zionism and the effect of the Balfour Declaration see, Stein, *The Balfour Declaration* (New York: Simon and Schuster) (1961).
[36] See below.
[37] See, Stein, *The Balfour Declaration* and Jeffries, *Palestine: The Reality* (London: Longman Publishing) (1939).
[38] British Government, British Public Records Office, *Cabinet No. 24/24*, August 1917.
[39] *Ibid.*

Therefore, despite the supposed safeguards for Palestinians in the wording of the Declaration – "...nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine..." – the Palestinians inheritance of the land was beginning to be eaten away at even before mass Jewish immigration had begun.

Through the Balfour Declaration, in addition to the denial of possible rights to the native Palestinian population, the British Government was making promises regarding the future of the land before it had even ceased officially to be part of the Ottoman Empire. Therefore, by some, the Declaration has been regarded as being contrary to international law.[40] This issue will be returned to below as it requires some examination. However it is also important to note that the Declarations flaws do not end there. Through the contradictory promises made to the Zionists and the Arabs, incompatible expectations were created about independence. Also as a result of the Zionists' and British Government's intentions the inheritance of the native Palestinian population were in effect ignored. Furthermore, the Palestinians did not have an effective organisation to represent their collective views and mobilise support, other than the Sherif of Mecca, who was not as active as the Zionist Organisation.

As far as discussions regarding the Palestinian question before the international community were concerned, the issue was not properly introduced in the League of Nations until towards the end of the First World War. At a similar time the League had introduced the system of mandates into the international community so the question of mandating the area of Palestine was raised. Mandates attempted to balance the demands of the colonial period with the need to also recognise the rights of the people colonised.[41] Article 22 of the League of Nations Covenant placed certain territories under the "tutelage" of more developed nations. Notably, Article 22 also stated that the mandate should be for the "well-being and development" of the people in the territory.

One particularly relevant issue for this study, relating to the creation of the mandate, is the poor representation that the Palestinians received during discussions about it. For

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[40] See, Cattan, *The Palestine Question*, at 30 – 33.

[41] For discussion regarding mandates and trust territories see, Brierly, "Trusts and Mandates" (1929) 10 *BYBIL* 217 and Chapter 13 "Mandates and Trust Territories" of Crawford, *The Creation of States*.

example, the Paris Peace Conference, of 1919 was attended by Sherif Husain's son, Emir Feisal who was the sole Arab delegation. To add to the delegation's isolation, it was reported that Feisal was somewhat ignorant of the full aims of Zionism, was not used to European style diplomatic discussion and possessed a weak command of the English language. This meant that the Palestinians were not sufficiently well represented and again suffered from the extremely polished diplomacy of the Zionists. Furthermore, it has also been suggested that the impartiality of Feisal may be questioned due to his wish to also serve his family's own interests in power.[42]

Arab Nationalists did prove to be a better representative force at the King-Crane Commission which was set up under the influence of United States President, Wilson, following the Paris Peace Conference.[43] They suggested full independence for Syria (to include the territories of Lebanon and Palestine) without the need for any mandate system.[44]

The Commission rejected this, suggesting instead a more impartial American mandate over Syria. Importantly, however, the Commission did stress the need for self determination of the Palestinian population. Unfortunately, due to the strong allied policies on Palestine and the United State's choice to remain outside the League of Nations the King-Crane Commission's recommendations received scant support.[45]

Ultimately, the area of Palestine was classed by the League of Nations as a 'Class A' Mandate which meant that it was fairly well developed and it needed only

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[42] *The Origins and Evolution of the Palestine Problem,* at 17. It should be noted however that Feisal did not ask for an extension of his Father's territory, "In placing the Arab case before the conference the Emir and his advisers do not seem to have thought it politic to be quite so explicit. The Emir, who asked for no extension of this father's territories, confined himself to pleading for the independence of all Arab countries and urging that together they formed a racial and economic unit. He does not appear to have referred to the question of what Power or Powers should be given control. It is said that he asked for an international commission of inquiry on the subject." From Temperley (Ed.), *A History of the Peace Conference of Paris,* at 144 – 145.

[43] For a brief description of Arab Nationalism in the early part of last century see Chapter I, Part I A, Temperley (Ed.), *ibid.*, at 118 – 133 and 170 – 176.

[44] *The Origins and Evolution of the Palestine Problem,* at 18.

[45] See Nutting for a more detailed description of events: Nutting, *The Arabs*, (London: Hollis and Carter) (1964), cited in *The Origins and Evolution of the Palestine Problem*, at footnote 49.

administrative advice and assistance from a mandatory power so that it would be able to become fully independent as soon as it was capable of standing alone.[46]

The mandate for Palestine was awarded to Great Britain and despite the original objections to the Balfour Declaration,

> "In its third recital, the mandate declared that recognition was thereby given to the 'historical connection' of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country."[47]

The mandate was approved by the League on 24 July 1922 and came into formal effect in September 1923. The approval of the League meant that in effect the Balfour Declaration was sanctioned by League members – the strongest elements within the international community.

It has been argued that the mandate was invalid under international law for three main reasons. First, that given the inclusion of the Balfour Declaration in the wording of the mandate, the League did not possess the power to grant any promises regarding the establishment of a Jewish National Home and dispose of the territory in such a manner. This is particularly so when it is considered that this went against the sovereignty of the Palestinian people and effectively gave an alien people rights within that territory[48]

Second, the mandate violated the "spirit and letter" of Article 22 because the "well-being and development" of the Palestinians was clearly not to plan for Palestine to

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[46] Mandates were provided for in Article 22 of the League of Nations Covenant. The degree of assistance for each mandated territory depended on the level of its internal development and could be classed as 'A', 'B', or 'C' ('C Class' mandates being the least developed).

[47] Cattan, *The Palestine Question*, at 25.

[48] *Ibid.*, at 30 – 33. See also Crawford's discussion on the validity of the mandate in Crawford, "Israel (1948 – 1949) and Palestine (1998 – 1999): Two Studies in the Creation of States" chapter 5 from Goodwin-Gill and Talmon, *The Reality of International Law – Essays in Honour of Ian Brownlie* (Clarendon Press: Oxford) (1999), at 104 – 106. Some have submitted that in international law a "...unilateral declaration issued by the competent authorities of a state can have a binding effect upon that state, if such were the intention behind it" based on the decisions in the case concerning Legal Status of Eastern Greenland (1933) *PCIJ Rep.* Series A No. 53; (1933) 3 *World Court Reports* 151, at 192 – 194 and the *Nuclear Tests Cases* (1974) *ICJ Rep.* 253, 267, 457, 472 cited in Dinstein, "The International Legal Dimensions of the Arab-Israeli Conflict" from Kellerman, Siehr and Einhorn (Eds), *Israel Among the Nations: International and Comparative Law Perspectives on Israel's 50th Anniversary* (The Hague/London/Boston: Kluwer Law International) (1998) 137, at 139.

become a Jewish National Homeland.[49] Third, the inclusion of Balfour Declaration was incompatible with the promises made in the Husain-McMahon correspondences.[50]

However, as was generally the case at that time, the Palestinian people were not in a position to be able to argue against the wording of the mandate and therefore the granting of the mandate and the plans for a Jewish homeland went ahead.

This theory that the mandate is in violation of international law is possibly supported by the decision in the *Namibia case,* however for different reasons from those given above.[51] The South African presence in South West Africa was deemed to be illegal because the Court upheld the validity of the termination of the Mandate. The Court noted that even though the principle of self determination was not alive in its current form at the time of the creation of the mandate that,

> "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation. In the domain to which the present proceedings relate, the last fifty years...have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self determination and independence of the peoples concerned."[52]

Given that South West Africa was a C Grade mandate it therefore needed more assistance from the international community than Palestine supposedly did, for the Palestinian mandate was grade A. Under this reasoning, when the claim to Palestinian self determination is considered, if it is found to be valid, it may be possible to submit that there is an even stronger case for suggesting that the Palestinian mandate was illegal.[53] However even if it is acceptable to retrospectively claim illegality, unlike in South West Africa, the Palestinian mandate was never tested in this manner since the time when self determination theory has become more cemented in international law.[54]

At this point therefore, when the mandate was created, the area of mandated Palestine did possess international legal personality as a mandated territory. However all powers

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[49] Cattan, *The Palestine Question*, at 30 – 33.
[50] *Ibid.*
[51] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1971) *ICJ Rep.* 16
[52] *Ibid.*, at 31.
[53] The Palestinian claim to self determination is considered in section 3 below.

of legislation and administration were vested in the mandatory and it was therefore practically limited in the status it truly possessed.[55]

1.2.2: The Period of the Mandate

During the time of the mandate, British policy was directed towards the end result of the creation of a Jewish National Home. After the Balfour Declaration was made public in 1920, the Palestinians were not willing to simply accept such a denial of their rights within the territory, so sporadically there were outbreaks of violent Palestinian resistance to these plans.

The Zionist campaign continued nonetheless and it was claimed that there was an historical connection between the Jews and the Palestinian territory since Old Testament times when they emigrated there from Pharaonic Egypt and formed the twelve tribes of Israel. Although some Jews have lived in the region ever since, they were very thin in numbers after their second revolt against the Romans and numbers did not increase until immigration began in the nineteenth century.

As Jewish immigration escalated, Arab nationalism and discontent grew and there were a number of outbreaks of violence during the 1920s and early 1930s.[56] In the early 1920s in London the Muslim-Christian Association of Palestine tried to provide a voice for Palestinians and lobbied the British in both Palestine and London, mostly in order to provide an alternative option to the growing Zionist campaigning. However, they were not very effective.

The British Government continued to build upon the Balfour Declaration, making more plans for Jewish immigration.[57] This, coupled with the additional Zionist policies of

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[54] In the *Mavrommatis Palestine Concessions Case* (1924) *PCIJ Rep.* Series A. No. 2, the Court implicitly ruled in favour of the mandate's validity through the way it interpreted its terms, despite the fact that it was argued that it was invalid because of the denial of self determination.

[55] See Cattan, *Palestine and International Law* (London: Longman Publishing) (2nd Ed.: 1976), at 116 – 121 for further discussion regarding the sovereignty of mandated territories.

[56] Compared to 100,000 immigrants in the 1920s, during the 1930s about 232,000 Jewish people legally migrated to mandated Palestine – See, *The Origins and Evolution of the Palestine Problem.*

[57] For example, The "Churchill Memorandum" 1 July 1922 which stated that Jewish immigration was necessary in order to fulfil the policy laid down in the Balfour Declaration – British Government, *Palestine: Statement of Policy*, Cmd. 1700 (1922).

land-purchase and preferential treatment of Jews in employment, meant that the goal of a Jewish State was already well on its way.

National Committees which formed the Arab High Committee were established throughout Palestine by the Palestinians in order to oppose the British rule and Jewish immigration and to assume overall Palestinian leadership. The Palestinians took some comfort from a 1930 White Paper which seemed to reverse partially the solely pro-Zionist British policies.[58] However, a later letter from the British Prime Minister, MacDonald, to Dr Weizman (the leader of the Zionist Organisation) which was read out in the House of Commons, permitted further immigration and dashed Palestinian hopes for a more moderate approach to the situation.

Palestinian resentment grew and violent outbursts increased in frequency and severity. These were often directed at the Jews in Palestine as a result of the Jewish immigration, Palestinian political and economic treatment and Palestinian frustration at support for Zionist aims and lack of realisation of their own rights.

By 1933 the Palestinian resentment towards the mandate was so strong that the various different Palestinian political parties and groups decided to unite to create an Arab Executive Committee in order to provide a better front against the British Authorities. It had the aim of attempting to co-operate with the British in the hope of progress towards a more Arab orientated outcome.[59]

Nothing concrete came from this, however, and a surge in immigration in 1936 led to an Arab revolt. The immigrants to Palestine were predominantly Jewish due to the Nazi persecution of the Jews in Europe, (persecution which at that time had reached a devastating level). As the revolt continued and violence and striking increased, the Jewish community in Palestine responded to the Arab revolt with counter-violence. The Palestinian authorities reacted poorly and were unable to suppress the population, so other Arab leaders were asked to mediate in order to halt the revolt, which they did.[60]

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[58] "The Passfield Whitepaper", *Palestine: Statement of Policy*, Parliamentary Papers – Cmd. 3692 (1930).
[59] *The Origins and Evolution of the Palestine Problem*, at 34.
[60] For the Commission's Report on the Strike see, British Government, *Palestine Royal Commissions: Report*, Cmd. 5479 (1937).

The revolt was only followed by yet more violence and after the assassination of a British Direct Commissioner, the Arab Higher Committee was proscribed and many of its leaders arrested. The Mufti of Jerusalem escaped to Lebanon and continued to take charge of some of the organisation of the revolt which continued until 1939 and resulted in large scale British military mobilisation.

Following every outbreak of serious violence the mandatory set up a Commission to investigate the situation.[61] Each Commission found that hostility towards the Jewish immigration and their plans for a homeland, coupled with Arab desires for independence were the causes of the problems. The last of these Commissions recommended the termination of the mandate and the partition of the State.[62] After the report of a another Commission however, set up by the British Government, partition was considered to be impracticable.[63]

In 1939 the British adopted something of a reversal in policy. A White Paper planning to limit Jewish immigration and to grant Palestine independence within five years was announced.[64] There was a huge Jewish backlash to this directed against Arabs and the British.

As an international political backdrop to these events, in 1939 Germany invaded Poland, in whose defence Britain and her allies were compelled to go to war. The liberation of the concentration camps in 1945 revealed the extent of the atrocities of the Second World War. A significant proportion of this violence had been directed towards the Jewish population of Europe and it is estimated that up to 6 million were executed during this time. After the war ended in 1945 this resulted in a very strong push for mass Jewish emigration to Palestine.

With the dissolution of the League of Nations in 1946 the mandates created under article 22 of the Covenant officially came to an end. This, coupled with pressure from the United States to allow more Jewish immigration into Palestine, the British Government

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[61] There were Commissions in 1920, 1921, 1929 and 1936.
[62] The Peel Commission: Cmd. 5479, July 1937.
[63] The Woodhead Commission: Cmd. 5854, November 1938.
[64] Cmd. 6018, May 1939.

referred the question of Palestine to the newly formed United Nations for discussion.[65] A special session of the General Assembly was convened to look at the issue of the future of Palestine on 28 April 1947.

After months of deliberation at the UN in the General Assembly the United Nations Special Committee on Palestine was established where both Jews and Arabs and Palestinians were represented in discussions. There was disagreement in the Committee as to the best course of action. Eventually however, the General Assembly adopted resolution 181.[66]

1.2.3: 1948 - present

Resolution 181 provided for the partitioning of Palestine into two States; one Arab and one Jewish. The Resolution also provided for a *corpus seperatum* for Jerusalem which would be subject to an international regime. The Arabs in the region were firmly against this action and when the British mandate was terminated the birth of the State of Israel was declared.[67] No Arab State was declared due to opposition about the land allocated to the Jews. In defence of the Palestinians, due to Israeli territorial control being taken, an invasion of Israel was mounted by Egypt, Jordan, Lebanon and Syria.[68] The 1948 war resulted in territorial expansion for Israel compared with the land they were allocated in Resolution 181 and an exodus of many Palestinians from much of the territory Israel seized.[69]

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[65] Letter from the British Government to the Secretary General of the United Nations, 2 April 1947.

[66] (II), 29 November 1947 (Voting: 33:13:10 Those States against were mainly Arab or South American with the addition of Greece, Haiti and the Philippines.) There has been debate over the legality of Resolution 181. Questions have been asked in particular regarding the United Nations competence to partition Palestine see Wright, *The Middle Eastern Crisis*, address to the Association of the Bar of the City of New York, November 1968, cited in chapter 6 of Cattan, *The Palestine Question*. However, since that time many of the Israeli and Palestinian negotiations have been based around Resolution 181 and therefore it is submitted that there is implicit recognition of its contents.

[67] 15 May 1948.

[68] The war was officially concluded by four agreements signed between Israel and Egypt, Lebanon, Jordan and Syria. (24 February 1949, 23 March 1949, 3 April 1949 and 20 July 1949 respectively).

[69] Resolution 181 proposed Israel covered 14,500 km squared and after the 1948 war Israel occupied 20,850 km squared. Notably Israel seized and annexed Modern Jerusalem and its Western environs during the 1948 war. However Israel was defeated by the Jordanian army when it attempted to annex the Old City of Jerusalem therefore it stayed in Jordanian control until the 1967 war which is mentioned below.

When the war was over, Israel saw a dramatic increase in the amount of land it had under her control and various parts of the proposed Arab State were absorbed into some of the invading States.[70] During the war many hundreds of Arab villages had been depopulated through expulsion and massacres by the Israeli Army.[71] The Palestinians who fled became refugees in various other States, whilst some of Palestinians stayed in Israel.

Post 1948 Palestinians can basically be classed into four main groups. Firstly there were the Palestinians living as a minority within the State of Israel. Secondly there were the Palestinians living within Jordan on the West Bank. Thirdly, those living in the Gaza Strip under Egyptian administration and finally those who sought refuge in neighbouring Arab States or in the Diaspora.[72] The question of the Palestinian refugees who now live outside the areas of the West Bank and Gaza Strip is to this day a major issue in peace negotiations and United Nations debates.[73] As noted in Chapter One this thesis deals with those Palestinians who reside either within the West Bank or Gaza Strip.

The creation of the State of Israel was opposed by all the existing Middle Eastern States in the United Nations[74] and the subsequent Middle Eastern War of 1948 was an immediate attempt to halt the partitioning of Palestine. The Arab States did not relish a Jewish State as a neighbour. However, the Arab States were defeated and, as a result, Palestine as it was, ceased to exist. This conflict sowed the seed of Palestinian guerrilla movements.

The guerrilla movements decided to take matters into their own hands as they believed that the Arab States lacked the will to crush Israel. Furthermore, they also believed that by carrying out small guerrilla attacks against Israel, Israel would be forced to

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[70] The West Bank by Transjordan and the Gaza Strip by Egypt.
[71] For a detailed account see, Tannous, *The Palestinians,* at 633 ff. See also Cattan, *The Palestine Question*, chapters 9, 10, 11 and 12.
[72] See, Cattan, *ibid.*, chapter 10.
[73] See footnote 1 in Chapter One for some references to literature regarding Palestinian refugees.
[74] General Assembly Resolution 181.

respond in kind against the Arab nations, at which point they in turn would fight back, hopefully then bringing the State of Israel to its knees.[75]

The problems in the region continued and war broke out again in 1967. Israel pushed her borders further forward through concerns about security and a wish to increase the amount of territory under her control. The war itself lasted only six days, however Israel managed to poach land from her neighbours and through it came to occupy the West Bank, the Gaza Strip, Arab East Jerusalem (including the Old City), the Golan Heights and the Sinai.[76]

The 1967 war led to the adoption of Security Council Resolution 242 which called *inter alia* for ,

> "1 (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
> (ii) termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognised boundaries free from threats or acts of force."[77]

The requirements of Resolution 242 were not followed by Israel or enforced by the international community. The hostilities in the region continued and war broke out again on 6 October 1973.[78] On this occasion Egypt and Syria attacked Israeli forces in the Sinai and Golan Heights, (lands which were seized from them in 1967). Egypt managed to recover some land; however both states were unsuccessful to a large degree.[79]

After the Camp David Accords and the Israeli/Egyptian peace agreement in the late 1970s, the Palestinian issue resulted in sporadic violence and little international action.[80] In 1982 Israel invaded Lebanon for the purpose of increasing its security by making a

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[75] Lähteenmäki, *The PLO and its International Position*, at 43.
[76] The Sinai was handed back to Egypt in 1978 after United States support for agreement between the two States: The Camp David Agreements, 17 September 1978. The Old City contains the majority of the Holy places in the city.
[77] Security Council Resolution 242 (XXII), 22 November 1967 (Adopted unanimously).
[78] The Yom Kippur War – so called as attacks were launched on Judaism's most holy day, Yom Kippur.
[79] A cease fire was reached on 24 October 1973. Prior to this the Security Council had called for a cease fire in Resolution 338 (1973).
[80] See section 1.1 above regarding the politics of Israeli/Egyptian agreements.

cordon sanitaire around the Northern Israeli border. A corollary of the war was that Israel attempted to flush the PLO bases out of Beirut in Lebanon.[81]

In 1982 the Palestinian people began to create popular uprisings against their situation. The period of unrest was called the intifadah and during this time a further important stage in the history of the Palestinian question arose. In November 1988 the Palestinian National Council, which is the legislative and decision-making authority body of the PLO, declared the State of Palestine after more than two decades of Israeli occupation.[82] This was greeted with a mixed international response but overall the status of the occupied territories did not change significantly and official statehood remained elusive.[83]

The process towards settlement did not really move forward again until the Oslo Peace Agreements in 1993 which set out a time scale for agreement on various issues of Palestinian/Israeli importance, including that of occupation and Palestinian self determination.[84] It remains to be seen how successful the Oslo Accords have been as they have not yet been fully implemented. However, it can already be seen that they have failed to achieve their goals within the time frame envisaged by the agreement.[85]

The Accords led to the creation of the Palestinian Authority (PA) which is considered below. It also led to a mutual recognition of the PLO as legitimate representatives of all

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[81] See section 2.1 below.

[82] See Appendix I for a PLO organisation chart.

[83] Palestine National Council, Declaration of Independence, 43 *GAOR* Annex 3, Agenda Item 37, 13 UN Doc. A/43/827, S/20278, 1988; Palestine National Council Political Communiqué and Declaration of Independence, November 15 1988 (1988) 27 *ILM* 1660. See Chapter Three section 2.2.1 for discussion regarding the international community's response to the 1988 Declaration.

[84] A Copy of the full text of the Declaration of Principles signed at Oslo can be found in an Israeli Ministry of Foreign Affairs Publication, *Declaration of Principles on Interim Self-Government Arrangements* (Jerusalem: Israel Information Centre) (1993) and can also be found at (1993) 32 *ILM* 1525. See also, Schulman, "The Israel-PLO Accord on the Declaration of Principles on Interim Self – Government Arrangements: The First Step Toward Palestinian Self Determination" (1993) 7 *Emory ILR* 793; Cotran and Mallat (Eds), *The Arab-Israeli Accords* and McKinney, "The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine" (1994) 18 *Seattle ULR* 93. The Accords have received some criticism see, Rabbani, "Oslo is the problem, not the solution" 636 *MEI* 27 October 2000 20. Some have questioned whether the interim agreements leading from the Oslo Accords are treaties in international law: see Quigley, "The Israel-PLO Interim Agreements: Are they Treaties?" (1997) 30 *Cornell ILJ* 717.

[85] For example 4 May 1999 saw the end of the five year interim period laid down in the Oslo Accords. By this time the Accords had envisaged a final agreement being reached on the Palestinian question. The PLO had threatened to declare State on 4 May 1999, however this action was not taken. See, Usher, "Arafat Evades the Issue" 559 *MEI* 7 May 1999 3.

Palestinians and the right of the State of Israel to exist.[86] It was also at this time that the PLO renounced all violence and terrorism which increased the likelihood of a successful peace agreement.[87]

The Declaration of Principles (DOP) stated that,

> "The aim of the Israeli-Palestinian negotiations within the current Middle East Peace Process is, among other things, to establish a Palestinian Interim Self- Government Authority, the elected Council..., for the Palestinian people in the West Bank and the Gaza Strip..."[88]

The PA's jurisdiction covers the West Bank and Gaza Strip[89] and will last in its current form until an agreement about the permanent status of the occupied territories is reached between Israel and the Palestinian Representatives.[90]

The PA is a form of quasi-government which has 20 ministers in its cabinet and is led by a President - Yasser Arafat. There is also a Legislative Council which has 88 members.[91] These members have been elected by the Palestinians in the West Bank, the Gaza Strip and Jerusalem. This means that it is more likely to reflect accurately the wishes of the Palestinians in those areas than the legislative wing of the PLO – the Palestinian National Council.[92] This is important since it is given the authority to legislate in its areas of competence for the regions within its jurisdiction.[93] Although there has been transfer of authority to the PA, as Israeli troops withdraw from the Gaza Strip and parts of the West Bank, jurisdiction for Israeli settlements in the area and Israeli nationals has stayed under the control of the Israeli government .[94]

Other powers were transferred to the PA immediately after the entry into force of the DOP and the first stage of Israeli troop withdrawal from the Gaza Strip and Jericho area. These were provided for in Article VI paragraph 2 and were given, "...with the view to

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[86] The letters of mutual recognition are printed in, *Declaration of Principles on Interim Self-Government Arrangements* (Jerusalem: Israel Information Centre) (1993).
[87] See section 2.1 and 2.2 below.
[88] Article I, DOP.
[89] Article IV, *ibid.*
[90] Article I, *ibid.*
[91] See Appendix I for an organisation chart of the PA. .
[92] The PNC has 669 members which have mostly been appointed by the executive Committee of the PLO. The members of the Executive Committee are elected by the PNC and in turn the Executive Committee elects the Chairman of the whole organisation.
[93] Article IX, DOP.
[94] Annex II, Article 3(b), *ibid.*

promoting economic development in the West Bank and Gaza Strip.." Authority for "...education and culture, health, social welfare, direct taxation, and tourism" were agreed upon as well as the authority to "commence in building the Palestinian police force".[95]

The building of the Palestinian Police Force was also considered in Article VIII – "In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip...". However, Article VIII also makes clear some of the limits of the PA and reaffirms its lack of statehood by stating that some of the rights which are generally attached to statehood (such as the use of force in certain situations) are to remain within Israeli competence:

> "...Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order."

Overall the Authority was given powers in the three generally accepted main branches of government; legislative, executive and judicial.[96] The existence of these three elements means that the PA can in some respects be likened to a regular government of a state in international law, even though it does not possess all the powers of a government of a state. As a result of the establishment of the PA and the granting of some domestic powers, the Israeli military withdrawal and the disbanding of the Israeli civil administration for the areas could then commence.[97]

Although the PA exercises some of the elements which a regular government would undertake, as far as representation of the Palestinians is concerned, the Authority is very much the internal representative body and undertakes municipal functions.[98] Although

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[95] Article VI, paragraph 2, *ibid.*
[96] Article VII(2), *ibid.* The lack of separation of powers in the establishment of the PA has been criticised as it has affected the rule of law within the territories and has resulted in a lack of safeguards for the protection of human rights - this issue is revisited in detail in Chapter Five of this thesis in section 1.1.2.
[97] Article VII (5), *ibid.*
[98] See Chapter Three for examination regarding to what extent the PA can be considered to possess the attributes of a government of a State in international law. It should be noted in relation to its municipal functions that for example, the Interim Agreement also transfers authority in the following areas: agriculture, forests, direct taxation, education and culture, gas, fuel and petroleum facilities, health, insurance, interior affairs, labour, land registration, legal administration, local government, parks, planning and zoning, population registry and documentation, postal services, telecommunications, tourism, transportation, public works and housing and holy sites. For more description see, Danjani,

there is undoubtedly overlap between the Authority and the PLO in both ultimate aims and also in personnel, it is the PLO which represents the Palestinians in all negotiations with Israel and, to the extent it is able, at an international level. In very basic terms the PA is in "a position of subordination to both the PLO and Israel".[99]

Foreign relations is also an area in which Israel has retained competence under the DOP.[100] Nonetheless, this has not necessarily stopped the PLO seeking and sometimes improving Palestine's status within the international community and at a bilateral level with some States, as will be examined in the following chapter.

Initially the PA only had jurisdiction in the Gaza Strip and Jericho area of the West Bank.[101] In September 1995 the Israeli-Palestinian Interim Agreement extended that jurisdiction by splitting the West Bank into A,B and C areas.[102] In Area A which comprised mostly large urban areas the PA took immediate control of public order and internal security. In Area B, comprising mostly small villages within the West Bank, the PA took control of public order and internal security of Palestinians.[103] In Area C there was a plan for Israel to gradually hand over control to the PA during the period of time before a final settlement was reached.[104]

Although the time frame envisaged in the DOP for reaching a final agreement about the status of the occupied territories has passed, the PA is continuing its task of administering the area in the fields of competence which it was granted in Article VI. [105] If and when a final agreement is negotiated the powers of the PA may well increase.

"Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period" (1997) 26 *Denver JILP* 27, at 67.

[99] Danjani, *ibid.*, at 90.

[100] Annex II, Article 3 (b), DOP. Singer submits that, "These arrangements, therefore, are indicative of the intention of the parties to establish autonomy, and not an independent entity, in the Gaza Strip and the West Bank" – Singer, "Aspects of Foreign Relations Under the Israeli-Palestinian Agreements on Interim Self Government Arrangements for the West Bank and Gaza" (1994) 28 *Is. LR* 268, at 296.

[101] Israel-PLO: Agreement on the Gaza Strip and the Jericho Area, May 4 1994: (1994) 33 *ILM* 622.

[102] Israel-PLO, Interim Agreement on the West Bank and the Gaza Strip, September 28 1995: (1995) 36 *ILM* 551. This Agreement is sometimes referred to as *Oslo II.*

[103] Israel remained in control of security for Israeli nationals within the area and terrorism.

[104] "Areas A and B together contained about 68% of the population of the West Bank and 23% of its land." – Bisharat, "Symposium: The Legal Foundations of Peace and Prosperity in the Middle East. Peace and the Political Imperative of Legal Reform in Palestine" (1999) 31 *CWRJIL* 253, at 258.

[105] May 1999 was the deadline laid down in the DOP.

Indeed they would have to increase if a Palestinian State came into existence, unless an entirely new governmental body were to be formed.

The situation is not wholly straightforward, however, since the exact extent of the PA's power in the Gaza Strip and West Bank in international law is not fully clear from considering only the DOP. Israel has argued that, although the creation of the PA meant that the Israeli Civil Administration for the territories was dissolved, the military government has not been (even if there has been a troop withdrawal).[106] This means that military government still has residual powers in the functions and territorial areas which have not been transferred to the PA.

However, the *de facto* status of the PA is also dependent on the recognition and interaction it has with the rest of the international community. It is this aspect of the PA which will be considered in the next chapter.

Since the Oslo Accords there has been a continued search for peace between the Israelis and Palestinians, particularly regarding issues such as the sovereignty of Jerusalem and the final settlement of the Palestinian question. However, despite small Israeli troop withdrawals and limited agreements, significant steps forward have not been taken.[107] Indeed some of the years have been marred by violence and recriminations on both sides. Recently there has been a particularly heightened level of tension within the territories. September 2000 saw the violent clashes between Israelis and Palestinians reach a disturbing level, to the point where the term *intifadah* was once again being used to describe the situation in the West Bank.[108] In April 2001 the fighting between Israel and Palestinians had reached such a level that the Israelis attempted to regain control over parts of the Gaza Strip which had already been handed over to the PA. A hasty retreat was made by the Israelis after the United States of America referred to their

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[106] See Malanczuk, "Basic Aspects of the Agreements Between Israel and the PLO" (1996) 7 *EJIL* 485, at 494 – 498.

[107] For example, The Wye River Agreement or the Hebron Troop Agreement.

[108] Usher, "The Long Haul" 639 *MEI* 8 December 2000 7. The intifadah was initially sparked by Ariel Sharon (before he became Israeli Prime Minister) in September 2000 when he visited the Temple Mount (claimed by both Jews and Muslims to be a sacred site), for a discussion regarding Jewish and Muslim claims see, Wasserstein, "Have Some Guts British Jews". It has been reported that Fateh, Yasser Arafat's political and military movement which is very influential in PLO policy has been the driving force behind the latest intifadah, see Usher, "Going Up in Flames" 636 *MEI* 27 October 2000 4. For a discussion regarding the UN response to the intifadah see Williams, "United Nations: The US reverts to type" 636 *MEI* 27 October 2000 13.

action as "excessive and disproportionate".[109] Nonetheless, it remains to be seen whether the seemingly intractable problem of Palestine can be resolved effectively and even more problematically, peacefully.

With the Palestinian situation now placed in historical context, the discussion can now turn to consider the representation of Palestinians in the West Bank and Gaza Strip.

2: THE REPRESENTATION OF PALESTINIANS, PARTICULARLY IN THE WEST BANK AND GAZA STRIP.

Whilst this study predominantly looks at representation of Palestinians within the West Bank and Gaza Strip it is also interesting to briefly consider the gaps in representation for other Palestinians.

This gap was disputed by some as the creation of the State of Jordan, which came out of some of the British mandated area, was arguably the embodiment of a Palestinian State in the region. However, as not all Palestinians, and certainly not all Palestinians that had once resided within historical Palestine were living within Jordan, the needs of many for representation failed to have been met.

However, even those Palestinians living within Israel had very little effective or official representation at either national or international level for Israel predominantly represented Jewish views and aspirations at an international level. The Arab nations and the Arab League did offer some form of representation for Palestinians generally and the hostile political climate between Arab and Jewish neighbours in the Middle East meant that the Palestinian cause would be frequently brought up and discussed in the international community.[110] However, what the Palestinians lacked was a cohesive, effective group to make their collective views known at an international level. This

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[109] Remarks made by the United States of America Secretary of State Colin Powell. See Adams, "Excessive and Disproportionate" 648 *MEI* April 20 2001 1.

[110] The Arab League was founded in Cairo on 22 March 1945. Its founding members were: Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Trans-Jordan, Yemen and a Palestinian Representative.

need was acute given the intention to attempt to raise support for the creation of an Arab State within the boundaries of historical Palestine.

Since the PLO takes a very active role on the international stage in representing Palestinians the following section considers its make-up and history in a little more detail. It is true to say that the PLO officially represents all Palestinians, however for the purposes of this study their representation of Palestinians in the West Bank and Gaza Strip will be examined as this is the area in which it is intended to create a Palestinian state.

2.1: The PLO[111]

The PLO was founded in 1964 by the First Summit of Arab leaders.[112] Egypt's President Nasser led the way in forming the PLO along with the support of the consensus of Arab States. Ahmed Shuqairy, a distinguished Palestinian diplomat who had worked for Syria, Saudi Arabia and the Arab League was appointed with the task of raising support for the new organisation. There was a mixed response within the Arab world to the plans, particularly within the pan-Arabist groups which tended to support only entities which worked for the greater Arab cause rather than separatist issues.

Support for the PLO was vital at this stage if it was to present a coherent resistance organisation with the aim of Palestinian liberation. It was important for it to be on good terms with Fateh – an underground liberation group which had formed in the late 50s and early 60s and was committed to an armed struggle. Fateh was not wholly supportive but about 12 Fateh delegates did attend the PLO's founding conference in May 1964. At the end of the month the Palestinian National Charter was issued, as was the Basic Constitution of the PLO.[113]

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[111] See Appendix I for organisation chart of the PLO.

[112] Cobban notes that, "Actually, two summit meetings of Arab Heads of State had preceded the 1964 gathering, in May 1946 and November 1956. But the January 1964 summit has gone down in history as the 'First Arab Summit', and subsequent summits have been numbered accordingly" – Cobban, *The Palestine Liberation Organisation* (Cambridge: Cambridge University Press) (1984), at 275, footnote 17.

[113] The full texts have been published by the PLO, however they have also been printed in Becker, *The PLO: The Rise and Fall of the Palestine Liberation Organisation* (London: Weidenfeld and Nicolson) (1984), at 230 – 240.

However, this did not present a unified front as internal quarrelling about territorial aims and bad relations with the Arab High Committee in Palestine and Fateh dogged PLO politics for a number of years.[114] Fateh continued to make preparations for its own armed struggle which it commenced in the mid years of the 1960s.

It was only after the 1967 war in which Israel was victorious that the various Palestinian resistance movements began to form a more organised and concerted effort under the heading of the PLO. Fateh was at that time headed by Yasser Arafat and it was this group which took many of the more senior positions within the PLO. In 1969 he became the Chairman of the Executive Committee of the organisation and it became more central to the role of mobilising Palestinian support.[115] In the following years many of the Palestinian Resistance Groups began their campaign of international terrorism in order to attempt to bring the notion of Palestinian Statehood to the attention of the world. At the same time, the PLO began to set up various internal organisations relating to health, education and other relief services within Palestine. The PLO had thus become an umbrella organisation for various Palestinian factions and took on a central role of energising the Palestinian cause both internally and at an international level.

The Hashemite Kingdom of Jordan did try to take on the task of representing Palestinians for a period of time after 1948. The formation of the PLO, however, in 1964 caused this to be particularly questioned by the Palestinians of the West Bank and during the early 1970s this issue was an on-going debate.[116] After much discussion, in 1974, Jordan agreed that the PLO may represent all Palestinians on occupied land once it had been liberated.[117] This decision was taken by Jordan (along with the other Arab states) at the Seventh Arab Summit Conference at Rabat in October 1974. This

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[114] For a detailed discussion regarding the PLO, its organisation, goals and means including is political, psychological, economic and military strategies see, O'Brien, "The PLO in International Law" (1984) 3 *BUILJ* 349, at 350 – 368.

[115] See Appendix I for Organisation chart within the PLO.

[116] See, Becker, *The PLO*, at 48 – 55.

[117] Jordan disputed the PLO claim to be legitimate Palestinian representative at the Arab Summit in Algiers in November 1973, however in Rabat in 1974 this position was reversed in favour of the PLO. See Kassim, "The Palestine Liberation Organisation's Claim To Status: A Juridical Analysis Under International Law", at 18 and footnote 99 and Silverburg, "The PLO in the UN: Implications for International Law and Relations" (1977) 12 *Is. LR* 365, at 372.

occurred mostly as a result of the PLO diplomatic successes through being invited by the General Assembly to have UN observer status.[118]

Israel was unhappy with the Palestinian resistance movements and the methods they used to make their cause known. Many of the Palestinian resistance leaders within the PLO were resident in Beirut so in 1973 the Israeli Army raided the Centre of the city and tried to flush out the Palestinian Resistance movement. The PLO was damaged but Arab diplomatic victories that same year, when the PLO was recognised by the Arab Summit in Algiers as the sole representative of the Palestinians, meant that its influence on behalf of the Palestinians was increasing.[119]

Throughout the 1970s the PLO's position in the international community increased and it gained more legitimacy as the representative of the Palestinians, in both international organisations and with individual States.[120] By the beginning of the 1980s Palestinian nationalism was rising and there was a growing sense of dissatisfaction within the occupied territories. The safety net of Arab support had been weakened by the 1978 Camp David agreements and the growing Israeli/Egyptian peace initiatives. For the PLO however, this at least meant that the different factions within Palestinian resistance, although not wholly unified, were pulling together far more than before and linking themselves more strongly to the Palestinians in the West Bank and the Gaza Strip.

After the Palestinian uprising (*intifadah)* had begun in 1982, the next major turn in the road came in 1988 when the State of Palestine was declared by the Palestinian National Council.[121] Although this was an important date for the PLO in its efforts to liberate Palestine and act as representative of the Palestinian people, perhaps more significant are the steps it took in the early 1990s.

Discussions with Israel in Oslo in 1993 led to the Declaration of Principles which created the beginning of some level of Autonomy for Palestinians in the West Bank and Gaza Strip. Most importantly for the PLO at the time of the Accords, Israel recognised

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[118] General Assembly Resolution 3237 (XXIX), 22 November 1974 (Voting: 95:17:19). For more discussion on the Palestinian delegation at the United Nations see Chapter Three section 2.1. See also Burke, *International Recognition of a Non-Nation State: The PLO and the UN* (M.Phil Thesis: Oxford) (1979), at 78 – 79.

[119] Algiers, 26 – 28 November 1973. The Jordanian delegation expressed some reservations on this issue.

[120] See the many examples given in Chapter Three.

the PLO as being the "representative of the Palestinian people".[122] At this time the PLO also recognised "the right of the State of Israel to exist in peace and security". [123]

In considering the representations of the Palestinians in the West Bank and Gaza Strip it is also important to consider whether there are any competing claims to represent Palestinians.

2.2: Competing claims to represent the Palestinians

The task of representing the Palestinians is fraught with internal politics, both within the PLO itself and within the community of Palestinians. There are other factions which have varying levels of support within Palestine which have different political complexions and sometimes different ultimate goals from the PLO. Hamas, the Popular Front for the Liberation of Palestine, Islamic Jihad and the Democratic Front of the Liberation of Palestine all take slightly different stances to the PLO on Palestinian question and therefore appeal to different elements of Palestinian society.

The PLO is perhaps the most liberal Palestinian liberation organisation in terms of the concessions about territory and struggle it has made in order to attempt to reach some kind of breakthrough in peace negotiations.[124] This is partly because the external political arena within which any Palestinian representatives must operate can greatly affect the support which they receive and ultimately the success of their struggle. When that support is reliant on inter-state power struggles and old friendships however, the situation can be more susceptible to the trappings of politics rather than solely the merits of the issue at hand. This can be seen in Chapter Three where the international communities response to the Palestinian representation is considered.

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[121] Palestine National Council Declaration of Independence (1988).
[122] Letter of recognition from Yitzhak Rabin, Prime Minister of Israel to Yasser Arafat, Chairman of the PLO, 9th September 1993, printed in Israeli Ministry of Foreign Affairs Publication, *Declaration of Principles on Interim Self-Government Arrangements*.
[123] *Ibid.*
[124] See Adams, "Smacking of Desperation" 599 *MEI* 7 May 1999 1; Usher, "Arafat Evades the Issue" 599 *MEI* 7 May 1999 4 and Usher, "From Wye to Final Status" 608 *MEI* 17 September 1999 4.

It can be argued that the PLO has come too far in its struggle for recognition to be easily questioned now as the legitimate representative of the Palestinians. The current level of recognition has taken over three decades to accrue and for the Palestinians to change their national and international representative would set the peace process even further back. Negotiation would be impossible due to the strong likelihood that Israel would not recognise a new group.

The dominance of the PLO through recognition over any other group has meant that other claimants, competing with the PLO, to represent the Palestinians have been left to fall by the wayside to a large extent. Groups like Hamas, Islamic Jihad and the Democratic Front for the Liberation of Palestine have not received the recognition which the PLO has and have thus not achieved even the level of a legitimate representative.[125] The practice of recognition has acted as a further filter (in addition to political questions about the groups) in questions about their representation of the Palestinians.[126]

There are reports however, that since the establishment of the PA in Gaza and the West Bank, the popular support for the PLO has decreased.[127] There have been reports that

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[125] Although it should be noted that the Popular Front for the Liberation of Palestine and Hamas do both have some seats in the Palestinian Legislative Council, the Legislative Wing of the PA (see Appendix I for organisation chart).

[126] It has been suggested recently that Yasser Arafat has pandered to the requests of the United States of America on the conditions for deployment of troops from the West Bank laid down by Israel regarding the Wye Agreement at the expense of democratic decision making and Palestinian national policy. This kind of criticism leaves the door ajar for competing claims to represent the Palestinians to gain more political ground on the basis of lack of democracy in the current representation. However, despite calls from some groups for a "rival PLO" to be set up it seems that presently "further political action in the occupied territories" is the approach that will generally be taken. - quotation from Nayef Hawatmeh of the Democratic Front for the Liberation of Palestine, quoted in Fisk, "And They Called it Peace" *The Wednesday Review: The Independent* 16 December 1998 5.

[127] In the 1996 elections Yasser Arafat received nearly 88% of the popular vote and Fateh (his political party and a strong influence within the PLO) achieved 50 seats in the PA's Legislative Council. Fateh's influence in the PA may be stronger that the figure of 50 seats suggests as it has been reported that of the 35 Independent members of the Legislative Council "many" lean towards Fateh – Jerusalem Media and Communication Centre, *The Palestinian Council* 14 (2nd Edition: 1998), cited in Bisharat, "Symposium: The Legal Foundations of Peace and Prosperity in the Middle East. Peace and the Political Imperative of Legal Reform in Palestine", at 258. It is of interest to note that in addition to Palestinians in the West Bank and Gaza Strip being allowed to vote that the franchise was extended to those Palestinians living in East Jerusalem, even though the status of Jerusalem was an issue left for discussion to talks on the Final Status of the territories – see Wing, "The Palestinian Basic Law: Embryonic Constitutionalism" (1999) 31 *CWRJIL* 383, at footnote 4.

the PA has abused the human rights of some Palestinians, which has been confirmed by the Palestinian Human Rights Monitoring Group. [128]

Furthermore, PLO and PA relations with Hamas, a militant Islamic Group, which is the PLO's closest rival for representation and power are extremely bad.[129] Hamas rejects any political settlement with the Israelis and proclaims *jihad* against the Jewish State. Hamas is of the belief that too many compromises have been made on the part of all Palestinians in the name of peace.[130]

When the peace process and the negotiations between the Israelis and the PLO are at a difficult stage and there is mistrust of the PA, the popularity of the PLO drops significantly. It can be argued that a government is not likely to always be popular with its electorate; however the PLO's obvious concern as to this point was notably realised through the postponing of the municipal elections in the occupied territories in 1998.[131]

During these difficult times for the PLO within Palestine, Hamas appears to have seized the opportunity and is making a concerted effort to attempt to raise its popular support, which if successful will affect the true legitimacy of the current Palestinians representatives. The PLO and the PA are not showing much outward concern regarding the claimed 25% Palestinian support for Hamas, despite the fact that in international law, it could affect their status.[132] In reality however, it is clear that legally there is not a

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[128] Silver, "Arafat's Authority Tortures its People" *The Independent* 18 December 199714 - where 18 cases of Palestinians prisoners who have died since 1994 are cited. See also Chapter Five of this thesis which deals with the question of responsibility for Human Rights abuses in the West Bank and Gaza Strip on both the Israeli and Palestinian sides.

[129] Hamas has a non-military, administrative, charitable and political wing and a military wing which has launched many deadly attacks against Israeli civilians and soldiers. Hamas means "zeal" in Arabic and is the acronym of "harakat al-muqawima al-islamiya" meaning "arab resistance movement", see Bisharat, "Symposium: The Legal Foundations of Peace and Prosperity in the Middle East. Peace and the Political Imperative of Legal Reform in Palestine", at 275 footnote 89. Some of the Hamas leaders were resident in Jordan, however, in an unusual move, Jordan deported 4 senior members to Qatar on 21 November 1999, see Kamal, "Hamas: Has Jordan Gone too Far?" 613 *MEI* 26 November 1999 4.

[130] Sharrock, "Albright attacks 'dangerous' mistrust of Middle East Forces" *The Guardian* 28 April 1998 14.

[131] Palestinian Times Staff, "Arafat Scraps Municipal Elections for Now" *Palestinian Times* 16 September 1998 3.

[132] Chapter Three deals with the status of the PLO and PA in international law therefore debate as to this issue is left for that discussion. This section aims to provide a brief overview of the competing claims to represent Palestinians. D'Amato remarks that within situations of self determination it is important that there is still diversity of opinion within them: "As we begin to define groups by their feeling of self determination - by their own sense of autonomy - it may develop that individual dissent within that group is quickly snuffed out because the group cannot tolerate dissent.": "Communities in Transition: Autonomy, Self-Governance and Independence" (1993) *Proc. ASIL* 248, at 252. Whilst it is hard to predict how much this occurs in any situation, it is not a particular known concern in relation to the

great challenge to the their position as legitimate representative of the Palestinians because as a result of state practice they are in a strong position in relation to recognition by states and international organisations.[133]

Very importantly, since their recognition by Israel, the PLO has had the *opportunity* to represent the Palestinians at peace negotiations. This in itself has increased its profile in the international community. Furthermore, it is certain that Hamas (or indeed any other current group) would be very unlikely to gain such international recognition and even less likely to be allowed to join in negotiations by the Israelis, as by their own admission, they have been behind many of the killings and bombings within Israel and do not appear likely to renounce their tactics.

Overall it can be argued that the status of the PLO and the PA as legitimate representatives is both assisted and hindered by the current climate in the occupied territories. Nonetheless, the hindrances, such as the support for Hamas, which perhaps comes partly through the dissatisfaction with the peace process, does not change the reality of the situation. The reality is such that Palestinian representation by the PLO and PA is now well accepted in the international community and at present no other viable opposition exists.

In any situation where claims are being made to territory by a group purporting to represent a people the question of self determination becomes an issue. In such cases the legitimacy of a people's representatives will be under scrutiny, hence the preceding debate. Given that in the previous chapter the nature of a group's claim to self determination was singled out as an important issue in achieving status, the Palestinians claim to self determination based on some of the evidence provided above will now be considered.

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occupied territories, particularly as there are various groups on the political scene; however it is certainly an issue which should be borne in mind.

[133] See Chapter Three.

3: THE PALESTINIAN QUESTION; REPRESENTATION AND SELF DETERMINATION

The issue of international status and representation for the Palestinians has always been linked to the notion of self determination. The 'basics' of self determination have already been considered in the previous chapter.[134] Since this chapter hones in on the Palestinian situation it is important to apply those principles to that situation as the quality of the claim to self determination can affect the mandate of the representatives to represent and the effectiveness of their "case" as presented to the international community.[135]

In the light of the previous chapter already having considered the issue of a post colonial right to self determination, the issues in need of discussion here relate to whether the Palestinian situation is one within which the claim can be brought and within this whether the Palestinians are a 'people' under international law. From there it is necessary to move on to consider if the PLO and the PA are legitimate representatives of their community. Much of this may be able to be done by referring back to the factual evidence provided in sections 1 and 2 above.

3.1: Is the Palestinian situation one in which the right to self determination can be claimed?

It should be stated at the outset that the DOP does not conclusively settle the issue of self determination, despite this issue being at the heart of the need for the peace agreement in the first place.

Although the DOP does not mention external self determination, the Articles which provide for the setting up of the PA do, in effect, consider the need for *internal* self determination. This can be seen in Article III which deals with elections to the PA,

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[134] See Chapter One, section 3.
[135] See Chapter One, section 3.2 regarding the importance of the quality of the claim to self determination.

"1. In order that the Palestinian People in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council under agreed supervision and international observation...
2. ...
3. These elections will constitute a significant interim preparatory step toward the realisation of the legitimate rights of the Palestinian people and their just requirements."

Without giving any indication of the extent of the *legitimate rights* and *just requirements* for the future, this Article places importance on democratic principles and the legitimacy of the PA itself. It was necessary for these issues to be at the heart of the creation of the PA if it was (and is) to have any political credibility and legitimacy amongst both the Palestinian people and other parts of the international community.

At a more international level, State opinion and UN resolutions gleaned through an examination of the UN discussions on the topic show that the majority of States and World organisations support a Palestinian right to self determination.[136] It seems that this is generally based on the right to self determination for peoples under foreign military occupation.[137]

There are various different viewpoints within the existing literature on Palestinian self determination. Some have argued that the Palestinian question relates primarily to the issue of a non-Muslim state in the Middle East and that the Palestinians in the West Bank and the Gaza Strip are not "racially, religiously or culturally distinct from the Arabs in the surrounding countries; they are of the same race speak the same language, and practice the same religion as the Arabs in Syria, Jordan, Saudi Arabia, Iraq, or Kuwait."[138] Others have said that the Palestinians clearly have a right to statehood because they have lived in that region "...forever, since time immemorial."[139]

Much of the question as to whether one believes that the Palestinians do have a *right* to self determination and independent statehood however, comes down to the legal

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[136] See General Assembly Resolutions 2672C (XXV), 8 December 1970; 2649 (XXV), 30 December 1970; 2792D (XXVI), 6 December 1971; 2963E (XXVII), 13 December 1972; 3089D (XXVIII), 7 December 1973; 3236 (XXIX), 22 November 1974. The right of Palestinians to self determination is regularly reaffirmed by the United Nations General Assembly.

[137] The United Nations has stated that the need for self determination can arise as a result of "alien subjugation, domination and exploitation", (Article 1(3) *International Covenant on Civil and Political Rights* (1966), 999 *UNTS* 171), or if a people are under "colonial and alien domination", e.g.: in General Assembly Resolutions 2649 *ibid.*; 2708 (XXV), 14 December 1970 and 2878 (XXVI), 20 December 1971. See also section 3.1.1 in Chapter One.

[138] Halberstam, "Nationalism and the Right to Self Determination: The Arab Israeli Conflict" (1994) 26(3) *NYUJILP* 573, at 578.

definition of self determination and who can claim such a right.[140] The following section addresses this issue in relation to the Palestinian question.

3.2: Are the Palestinians in the West Bank and Gaza Strip a "People" under International Law?

A definition of what kind of group is a people under international law is still far from clear. A people has been referred to as a "community with a distinct character"; [141] however a more precise working definition seems necessary. There is an inherent problem when attempting to find a definition for self determination as any claim may conflict with other rights claimed by different entities. For example, some have considered the issues of claims regarding territorial integrity and state sovereignty as automatically linked with self determination and have examined whether they are compatible.[142] If when compared, state sovereignty and state boundaries are more important than self determination, a restrictive approach to a definition would be adopted. This would ensure that the candidates for self determination are fewer.[143]

However, it is arguable that even if a restrictive approach is taken, the Palestinian situation (in terms of those Palestinians living within the West Bank and Gaza Strip) can be held to fall within a definition of self determination because the territorial boundaries are unclear and the map has been re-drawn a number of times due to occupation, the end of the mandate, the partition plan laid down in Resolution 181 and Jordanian annexation.

Peoplehood may also be said to be dependent on the fulfilment of both a subjective and an objective set of criteria. The objective criteria relates to there being an ethnic group where the individuals in that group are linked by a common history. The ethnicity, it can be argued is not necessarily dependent on shared religious beliefs, language or territory as these can easily be taken away from a group by through being split up due to

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[139] Boyle, "The Creation of the State of Palestine" (1990) 1*EJIL* 301, at 302.
[140] See section 3.1.1 in Chapter One regarding who can claim the right to self determination.
[141] Brownlie, "The Rights of Peoples in Modern International Law" from Crawford (Ed.), *The Rights of Peoples* 1, at 5. See also Bassiouni, "Self Determination and the Palestinians" (1971) 65 *Proc. ASIL* 31.
[142] Falk, "The Rights of Peoples (In particular indigenous peoples)" from Crawford (Ed.), *The Rights of Peoples* 17, at 25 – 26.

the "vicissitudes of history".[144] The subjective element is that that the group members must feel psychologically attached to each other and feel that they as a group belong together – having a will to live together and "continue common traditions".[145]

Although it is possible to say with a reasonable degree of certainty that some groups definitely do constitute a people and that some groups definitely do not, it is hard to be sure when a group does not clearly fall into either the *does* or *does not* category.[146]

In the case of the peoplehood of the Palestinians there have been various viewpoints put forward. It has been argued that the Palestinians in the West Bank and the Gaza Strip are not "racially, religiously or culturally distinct from the Arabs in the surrounding countries."[147] Therefore some might suggest that the creation of the State of Jordan satisfied the need for a Palestinian State within the Middle East.

However, if the notion of having a shared common experience and a psychological element to peoplehood is considered then the fact that Palestinians in the occupied territories are similar religiously, culturally, linguistically or racially to those in Jordan is perhaps not the only important issue. After having suffered alien occupation and conflict for over three decades and also expulsion from parts of the place they were living in 1948 then a shared common experience is perhaps the most binding factor for Palestinians in the occupied territories.

Given the number of UN Resolutions and the weight of academic opinion, it is not difficult to argue that the Palestinians are indeed a people entitled to self determination, certainly within the confines of the West Bank and Gaza Strip and that, as a result, they

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[143] See section 3.1 in Chapter One for more discussion regarding definitions of self determination.
[144] Dinstein, "Self Determination and the Middle East Conflict" from Alexander and Friedlander (Eds.), *Self Determination* (Boulder: Westview) (1980) 243, at 246 – 247.
[145] Renan, "Qu'est-ce qu'une Nation?" in *Ouevres Complètes* (Paris: Calmann-Levy) (1947) 1: 887, at 904, cited in Dinstein, *ibid.*, at 246 – 247.
Bassiouni also considered this issue at a meeting of the *American Society of International Law.* He adds the idea of *permanency* to the psychological elements of peoplehood – Bassiouni, "Self Determination and the Palestinians", at 32.
[146] For example, it seems clear that the East Timorese are a people under international law, whereas the Quebecois whilst distinct from Canadians in some respects do not have a right to secede from Canada in international law – see Cassese, *Self Determination of Peoples*, at 251. See also section 1.4.1 in Chapter Three which discusses the Parti Quebecois and looks at recent developments in the campaign for secession.
[147] Halberstam, "Nationalism and the Right to Self Determination: The Arab Israeli Conflict", at 578.

are entitled to their own representatives in the international community. From this however, the question arises as to who is entitled to represent the Palestinians.

3.3: Who can represent the Palestinians in the West Bank and Gaza Strip?

In sections 2.1 and 2.2 above the PLO was examined and it seems that it is the most suitable entity to class as the representative of both Palestinians in the West Bank and Gaza Strip and indeed of Palestinians in the wider diaspora. In section 3.1.2 in the previous chapter the requirements for representatives of a people were considered. The test suggested by Cassese was used. He stated that a group must have a "broad support among those it claims to represent" before it can obtain any level of status in international law as a result of its position.[148] Under this criteria it does appear that the PLO satisfies the test of legitimacy, as even if there are some issues regarding its popularity it is still the only feasible option.[149]

Overall it does appear that the Palestinians in the West Bank and Gaza Strip have a strong claim to self determination and a legitimate representative in the form of the PLO which is able to bring that claim into the international arena. The impact this claim has had can be seen by examining the response the PLO and the Palestinian question have had on the international stage. This will be done in the following chapter.

CONCLUSIONS

The preceding sections have considered the background to the question of the status of Palestinian Representation. The status of that representation in the international community does affect the way in which the Palestinians are able to present their claims. Therefore the type of representation and its claim to represent a people is vital to the fulfilment of its aims in terms of whether it is given the opportunity to make its case heard.

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[148] Cassese, *Self Determination of Peoples*, at 166.
[149] For issues of popularity see discussion in section 2.1 and 2.2 above.

In total however this chapter has three main observations to draw. First, to confirm that the political and religious aspects of the Palestinian question have affected the territory and the peoples who have lived there on their passage through history.

Second, it has been shown that the Palestinians in the West Bank and Gaza Strip, as a people, have a right to self determination and that this could be achieved through the creation of a Palestinian State. This means that the representatives of the Palestinians, in the form of the PLO and the PA do have a legitimate claim to bring before the international community. As was discussed in the previous chapter the quality of that claim can affect the likelihood of success. Therefore, although the Palestinian claim is sound and it would logically appear that success should follow, the historical and political issues surrounding the question and the competing claim to territory make a solution harder to find.

Third, in the shape of the PLO, the Palestinians have found an effective representative. It has grown into an organised, complex entity with a governmental like structure and commands a good deal of respect beyond Palestine itself. Given the range of opinion within Palestine and the Arab world about the Palestinian question, for a group to have been able to form such a cohesive body is impressive.

It is true to argue that the PLO has not been wholly effective, since its aims for Palestinian statehood have been modified and not yet realised. Nonetheless, given the exceptionally complicated political situation within which it operates and the intricate story behind the claims of the Palestinians, to have even reached the negotiating table was not a simple task.

Now that such initial questions have been discussed, the main issue to be considered in the next chapter concerns the status that Palestine and its representatives have accrued in international law. The question raised there will enable the theories regarding variable personality in Chapter One to be tested by using the Palestinian example. However, such discussion will also enable objective opinions to be drawn about the level of status achieved by the representatives of the Palestinians.

CHAPTER 3

THE STATUS OF THE PALESTINIAN REPRESENTATION IN INTERNATIONAL LAW

INTRODUCTION

In Chapter One it was asserted that a good description of the practice relating to the achievement of personality is that it can be variable. It was suggested that personality can be variable at many different levels: first, in terms of the range of responses of recognising states to non-state groups; second, in terms of the transitional period between claiming and achieving statehood; third, in terms of the different levels of status that an entity can have at any one point in time, depending upon with whom and under what circumstances it is acting. As discussed previously, an entity does not exist in a vacuum and a determination of a particular level of status is not merely a theoretical pronouncement. Determinations of status are important in terms of assessing the development of an entity's personality and attaching relevant rights and duties.

In order to build upon the work in Chapter One regarding variable personality, this chapter studies the Palestinian situation and considers how a non-state entity with a complex political, religious and historical background can be compared with it. The discussion in Chapter One regarding the value of recognition was important because it provided the tools by which to help assess the examples of state practice towards the Palestinian Representation. The views of the international community expressed through action and opportunities given to the Palestinian Representation to participate in international life can be used in order to help make a determination of the kind of status it can be deemed to possess. This will naturally involve drawing conclusions about the personality of the Palestinian Representation, however it will also provide information about the concept of personality in international law. This information will assist in understanding some of the concepts described in chapter one and help to determine

exactly how variable practice in relation to status and ultimately legal personality can be.

As was considered in Chapter One personality may be considered variable partly because the nature of the status accorded to an entity may change and evolve over a period of time. This transitional period is extremely important in the study of the status of the Palestinian Representation, since as a representative body which aspires to achieve Palestinian Statehood, a notion of personality which does not allow room for change would not be consistent with an achievement of their aims. Since States are keen to retain a certain amount of power when making determinations on status, often due to the political environment which undoubtedly influences their decision making processes, personality is automatically subject to external factors and thus must ultimately be flexible to a degree. Therefore it was suggested that the personality of a entity can change vis-à-vis other entities but also in terms of its own position in international society.

However, an evolutionary approach to personality does not make it any easier to establish status. Chapter One noted the continued importance which political factors can play in recognition decisions, for example when the former Yugoslavia was considered. Indeed examining status becomes more difficult as, depending on the context of recognition and the political scenario in which a decision to recognise occurs, an entity may well be recognised or treated as having differing levels of status by different sections of the international community. This is the time when it is of the utmost importance to understand the value of recognition. Therefore the examination in Chapter One has been useful in terms of that understanding and it can be applied in this chapter.

Enquiries regarding status must thus be carried out by an examination of the levels of status which an entity has achieved as a matter of fact and considering what the intention of the recognising body was in making such a determination.[1]

Keeping in mind the theory asserted in Chapter One, that personality can be variable, the aim of this chapter is to examine how far this is true in relation to a particular entity, the

[1] Brownlie, "Recognition in Theory and Practice", at 198 – 199.

Palestinian Representation. This will be examined through the recognition it has received from the international community. Various different sources will be examined, including the practice of individual states and that of international and regional organisations – including the United Nations.[2] From this it will be possible to draw conclusions about its relative level of status in various contexts.

[2] The practice of states and organisations is the "crucial test" in establishing status - Shaw, "The International Status of Liberation Movements", at 32.

1: VARIABLE PERSONALITY

Each relationship between every actor and another on the international stage is subtly different. That difference may amount to the consideration of an entity as an entirely different style of subject in international law – at one end of the scale. Or may simply be that slight political nuances alter specific interactions at that time – at the other end of the scale.[3]

Within the variable personality theory it is argued that there are a whole range of possibilities which an entity may class another entity as. The spectrum is wide and may range from considering an entity as a State (at the highest point) to a Terrorist organisation, for example (at the lowest point). In between these two points at the ends of the spectrum of possibilities come a number of other options, for example, a government (or provisional government) may be considered to exist before statehood is accorded.[4] An entity may be classed as a national liberation movement which aspires towards statehood and within this category there are various levels of status for national liberation movements. Or an entity may be considered to be a group which represents a people or a proportion of that people but does not interact with other actors at the level which a national liberation movement might do. Beyond that, lower down the scale of progression an entity would perhaps not be recognised at all and would obviously only sink to the classification of terrorist if it performed acts of terrorism.[5]

Furthermore within each of these categories there are spectrums of their own which determine their interactions with other entities. For example, even within the category "State", perhaps a 'rogue' state which has committed a number of international wrongs is likely to be treated differently from an old ally.

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[3] The same can be true of an entity's obligations. They may vary, depending on whether they are party to particular treaty regimes or members of particular international organisations, for example. Although it is status which is dealt with in this chapter the conclusions which are drawn may affect obligations, since in some circumstances *Entity A* may not be deemed to have sufficient capacity to enter into a treaty (for example) with *Entity B*.

[4] See section 1.2 below regarding the international legal criteria for a government.

[5] The notion of an entity as terrorist will not be considered here since the Palestinian Representation have now renounced violent tactics and also because it is an extremely broad issue and would merit separate enquiry of its own, (see section 1.2.4 in Chapter Two regarding the PLO's renunciation of violence). Suffice to say that classification as a terrorist organisation is within the bounds of possibility on the spectrum of actors on the international stage.

In this section the various points on the spectrum of possibilities which relate most directly to the Palestinian Representation will be examined. If there are any accepted criteria for that particular status they will be considered. Then in section 2 this study will consider some of the evidence of the defining occasions when the Palestinian Representation has acted on the international stage and with whom. This will enable a picture of where the Palestinian Representation falls on the spectrum of possibilities and in relation to whom to emerge. In turn this will assist in questioning the validity of claims that personality is variable.

1.1: The International Legal Criteria for Statehood

The Palestinian Representation has been recognised as a State by some States in the international community. This will be considered below. It should be borne in mind when these occasions are examined that there are some international criteria which are often applied when an entity seeks to become a state. As has been discussed in the first chapter, the issues of which theory regarding the value recognition is a better description of the law are less important than may first appear.[6] Indeed the international community often chooses to apply specific criteria in specific situations (and even then may not necessarily abide by them), as demonstrated through the promulgation and subsequent application of the EC Guidelines[7]

The importance of recognition in the creation of States has already been discussed in Chapter One, as have some of the basic criteria for Statehood.[8] However to re-cap, these are generally considered to be possessing a permanent population, a defined territory, a government and the capacity to enter into relations with other states.[9]

Whilst this list is by no means exhaustive of every situation and some of and in some situations a state may be deemed to exist before it has fulfilled all of the above criteria,

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[6] The Declaratory/Constitutive debate as examined in section 1.2 of Chapter One.
[7] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 16 December 1991 – see section 1.2.4.2 in Chapter One.
[8] See section 1.2 in Chapter One.
[9] Article 1 Montevideo Convention.

it is a useful place to begin when considering claims of Statehood. [10]

There are no upper or lower limits to a States population and there is plenty of evidence that a state does not necessarily have to have defined boundaries to satisfy the criteria of territory – Israel being a prime example, since her boundaries have never been finally settled.[11]

The issues surrounding when an entity can be classed as having a government are considered below in section 1.2. Having the "capacity to enter into relations with other States" is most often interpreted in line with Judge Anzilotti's opinion in the *Austro-German Customs Union Case.*[12] He referred to independence in law rather than a State being subject to the authority of any other State and therefore possessing the capacity to enter into relations with other states.[13]

1.2: The International Legal Criteria for Recognition of a Government

The criteria regarding when an entity may be classed as a government in international law undoubtedly also relate to when an entity achieves statehood, given the Montevideo criteria listed above. The time at which an entity can be said to become a government is an issue which can only be truly answered by considering the State practice in that area.

> "There has been only one rule governing decisions on whether to grant or refuse recognition to a new government: the necessary, but not sufficient, criterion is whether a government effectively controls its state."[14]

In other words the requirement that a government must actually and truly be able to discharge all the functions of the State.[15] Such a condition has been referred to as a '*sine qua non*' of recognition of an entity as the government of a state.[16]

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[10] As was discussed in Chapter One in relation to self determination and the examples of representative groups which were examined in section 2. See also section 1.2 below regarding the criteria for a government in international law.
[11] See also, Deutsche Continental Gas-Gesellschaft v Polish State (1929) 5 *AD* 11.
[12] Advisory Opinion (1931) *PCIJ Rep.* Series A/B No. 41.
[13] *Ibid.* For a more in depth discussion of statehood and recognition see, Crawford, *Creation of States* and also some of the literature referred to in the relevant sections of Chapter One.
[14] Peterson, Recognition of Governments Should Not Be Abolished", at 37.
[15] Effectiveness and "display[s] of State authority adduced as evidence of that sovereignty" (*effectivités* –

Furthermore,

"Within the limits of this rule, which forbids recognising before control is shown or continuing to recognise after control is lost, governments are free to adopt any one of a number of rules for decision. To add to the confusion most governments have asserted several at once, choosing among them as circumstances warrant."[17]

Other additional criteria are frequently suggested, however they do not have the weight of opinion which supports the criterion of effectiveness. They include, popular support,[18] legitimacy[19] and ability and will to fulfil international obligations.[20] These additional criteria are probably optional for states in their decisions as to whether to accord recognition however, and it seems that the only decisive requirement is that of effectiveness.

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see The Western Sahara Case (1992)*ICJ Rep.* 39: cited in Shaw, "The Heritage of States: The Principle of *Uti Possidetis Juris* Today" (1996) 67 *BYBIL* 75, at 134*)* have also been used as a way to establish title to territory – which is ultimately one of the effects which determining a government will have.
In the Palestinian situation the proposed partition plans of mandated Palestine into a Jewish and an Arab State (see Chapter Two, end of section 1.2.3 and beginning of section 1.2.4) did not follow the principles of *uti possidetis* because their application would probably have constituted a threat to the peace and security of the area.
Since there is a factual dispute as to where the borders of Israel and Palestine lie a court or tribunal for example could use "traditional mechanisms of territorial acquisition, which revolve around many of the techniques used in establishing the *uti possidetis* line such as the search for titles, *effectivités*, recognition and acquiescence, treaty interpretation, practice and estoppel." (See Shaw, *ibid.*, at 153.)

[16] Harris, *Cases and Materials* (5th Ed.), at 157.

[17] Peterson, "Recognition of Governments Should Not Be Abolished", at 37.

[18] Lack of agreed definition of 'popular support' which at a minimal level could merely refer to acquiescence, however those proponents of it usually suggest that it should involve either a plebiscite or referendum or voluntary obedience to the regime. Such definitions clearly link to the concept of self determination at an internal level and as a result lack of 'popular support' has been considered as a specific reason for non-recognition. See Peterson, *Recognition of Governments: Legal Doctrine and State Practice 1815 - 1995* (New York: St Martin's Press) (1997), at 52 - 56.

[19] Traditionally legitimacy has referred to the concept that one particular type of government is best. More recently this has included the notions of democratic legitimacy which obviously raises a whole series of issues regarding the definition of democracy. See Peterson's exposition in Peterson, *ibid.*, at 56 - 68. Franck has also argued that there could be a right to democratic governance, see Franck, "The Emerging Right to Democratic Governance" (1992) 86 *American Journal of International Law* 46. Since Franck raised these issues (which are extremely interesting but unable to be considered here in great depth due to the limits of space and time) other writers have taken the question a step further. In a study questioning whether democracy is a new criteria for recognition Murphy notes that (a) there is no norm obligating states not to recognise a non-democratic regime; (b) democratic referendums are important for those claiming status, but not decisive as other factors are also important; (c) when a non-democratic regime ursurps a democratic regime the international community may react by refusing to recognise it in an effort to get a return to democratic rule and (d) the international community is interested in democratic legitimacy but it is equally interested in economic development, international peace and security and stability. See Murphy, "Democratic Legitimacy and the Recognition of States and Governments".

[20] This includes a 'physical and administrative capacity', an 'intention and volition' to fulfil obligations which can cover both 'general and regional international law and the obligations contained in agreements with one or more states' - Peterson, *Recognition of Governments*, at 68 - 69.

Individual governments or organisations may choose to implement one of the others, but their interrelated natures, which depends partly on their interpretation, is no doubt a bar to setting their place in definitive international legal requirements. An ability to carry out international obligations will naturally go alongside the notion of an effective government and an interpretation of popular support which merely requires acquiescence is not sufficiently different from the concept of control.[21]

It seems clear from an examination of the state practice that the effectiveness of the government concerned is the only definitive criteria applied generally at an international level. [22] There has been a move away from the use of optional criteria by governments throughout this century, despite the fact that many still reserve the right to apply such criteria should they choose to.[23]

The recognition of governments is an issue which from time to time is required to be considered in domestic courts.[24] Such decisions constitute state practice on the issue and are thus useful in this examination. Domestic courts have traditionally often referred to statements by the executive wing of government as to the status of foreign regimes, however in recent times many states have now abolished or almost stopped the formal act of recognition of governments.[25] Therefore courts have been required to consider the criteria by which a government may be deemed to exist as the government of a particular state. In the instructive case of *Republic of Somalia v Woodhouse Drake & Carey (Suisses) SA and Others*[26] in the UK courts where this issue was considered in relation to the government of Somalia, Hobhouse J held that,

"Accordingly the factors to be taken into account in deciding whether a government exists as the government of a state are: a) whether it is the constitutional government of the state; b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; c) whether Her Majesty's government has any dealings with it and if so what is the nature of those dealings;

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[21] Peterson, *ibid.*, at 72. See also, *Klinghoffer v SNC Achille Lauro* 96 *ILR* 69, where the court stated that an entity (in this instance the PLO) cannot have the capacity to enter into formal relations with other nations unless it has a defined territory which is under unified governmental control since it is unable to implement such obligations.

[22] See, Peterson, *ibid.* for a comprehensive and insightful examination of almost two centuries of state practice.

[23] See *ibid.*, at 74.

[24] The internal aspects of recognition theory were considered in Chapter One section 1.2.6 where some examples of national courts involved in questions surrounding recognition were examined.

[25] Peterson, *Recognition of Governments*, at 178 - 184.

[26] [1993] 1 *All ER* 371.

and d) in marginal cases, the extent of international recognition that it has as the government of the state."[27]

When all is considered the conditions which were laid down in this case (which were based on criteria given in previous cases covering a similar issue) are very similar to those laid down above as the criteria in international law. There is an emphasis on a declaratory approach to recognition, given the importance placed on it in the final sentence of the quotation above. Notably, effectiveness and control are still the determining factors.

However, even effectiveness is a somewhat nebulous concept: "The appreciation of effectiveness remains essentially one of fact and a delicate task".[28] Even if recognition policies are altered so as not to make unilateral determination of recognition statements,[29] the "courts and departments of State will still need to decide when a particular government began to function with sufficient effectiveness",[30] for which a detailed assessment of the facts is required.

- **States without effective governments?**

Whilst it is true that States do consider many of the issues noted above when deciding whether to accord recognition to a government, it can be said that as discussed in Chapter One, the rules regarding recognition will be manipulated by the international community if it wants to admit a member to its society.[31] When considering recognition accorded to emerging states which are represented by liberation movements it seems true that the criteria of effectiveness is sometimes lowered, so that a new government claiming to represent a people with a right to self determination can be formalised.[32]

Certainly, in a situation where the international community has wanted to punish a government which was in power contrary to the right to self determination, it has

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[27] *Ibid.*, at 384.
[28] Brownlie, "Recognition in Theory and Practice", at 210.
[29] *Hansard* House of Lords Debates Vol. 408 Cols. 1121 – 2 (28 April 1980), cited in Brownlie, *ibid.*, at 209 – 210, note 36.
[30] Brownlie, *ibid.*, at 210.
[31] See section 1.2.7 in Chapter One.
[32] See section 3.2.1 on premature recognition in Chapter One.

refused to recognise such a government. In Southern Rhodesia, recognition of a government had been denied and the unilateral declaration of a regime almost universally condemned by the United Nations as a result of a denial of self determination to the majority of the population.[33] In Southern Rhodesia the minority government exercised effective control, however the Security Council still called upon all States "not to recognise this illegal racist minority regime".[34]

Some examples from state practice can be drawn upon to support the theory that there is a lower threshold of effectiveness in self determination situations.[35] They are colonial examples so the territory and population to the state in question were already settled. The issue was one of government and control. Although these examples have been used already in Chapter One, section 2.1, they are worth re-emphasising here in order to illustrate this point.

In Algeria the Provisional Government, which was set up by the FLN, was recognised by a number of states whilst it was still in its infancy and unable to carry out the functions of effective government. As time went on many newly independent and communist states accorded *de jure* recognition to the provisional government, despite the fact that,

> "by the traditional standards of effective government the GPRA [provisional government], not even located in the territory it claimed to govern, could not conceivably have been recognised as the government of Algeria."[36]

A further example is that of Guinea-Bissau which was a Portuguese colony struggling for independence through the movement Partido Africano da Independencia da Guine e Cabo Verde (PAIGC).[37] Within about 12 months of struggle the PAIGC declared the creation of the State of Guinea-Bissau and was recognised by over 40 states. The UN agreed that a sovereign state of Guinea-Bissau had been emerged and over the next year increasing numbers of states continued to recognise the sovereign State of Guinea-Bissau. To formalise this there the PAIGC entered into an agreement with Portugal.[38]

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[33] General Assembly Resolution 2024 (XX), 11 November 1965 (Voting: 107:2:1).
[34] Security Council Resolution 216, 12 November 1965 (Voting: 10:0:1), at para. 2.
[35] See also discussion in Warbrick, "Recognition of States: Recent European Practice", at 14.
[36] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 110. See also section 2.1.3 in Chapter One regarding the FLN.
[37] See also section 2.1.1 regarding the PAIGC.
[38] General Assembly Resolution 3601 (XXVIII), 2 November 1973 (Voting: 93:7:30). See description of

This all occurred despite the fact that the PAIGC did not exercise effective control within the territory. Nonetheless, the force of the international community pushing for the creation of a state through recognition due to the denial of self determination appeared to override this issue.

Whilst such examples initially appear to be contrary to the practice described above regarding the Montevideo Convention criteria, it is submitted that the existence of an unfulfilled right to self determination may alter the definitions of the criteria to be classed as a government. Therefore the requirements of the Montevideo Convention themselves are not dismissed, they are still applied, albeit with more flexible thresholds.[39]

Furthermore, in situations of self determination it is very difficult to judge criteria such as effectiveness against bodies which are not the sole authorities in that area, particularly as control may not be achieved until claims to self determination are also successful.[40] However, a situation such as a colonial one, where the State already exists and for example, it is the title to territory which is disputed and who or which groups should be in power by applying self determination principles or through the will of the international community, can be resolved by lowering effectiveness criteria. Is the issue the same when the question is asked in reverse however? Can a government be held to exist without the existence of a State?

- **Governments without States?**

Within the question as to whether the PLO or the PA (or indeed any claimant to be a government of a non-state actor) can be considered to possess the qualities of a government, the state practice considered above begs the question as to whether it is possible to declare that a particular entity is a government if the state which it is declared government of does not exist in international law? The answer to this lies perhaps partly in the theory which is adhered to regarding recognition of states. If the

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situation in Wilson, *International Law and the Use of Force by National Liberation Movements*, at 111 - 113.

[39] See discussion in section 3 in Chapter One regarding self determination and claims to status.

[40] See section 3.2 in Chapter One.

declaratory theory is held to be correct then it is possible to argue that a government may exist in international law before a state is formally recognised by other states or organisations. However, such a position would be untenable if the constitutive theory were considered to be the right method for determining statehood.

Alternatively, if as suggested in Chapter One through an examination of recent state practice both theories are flawed and a better description of the law is that an entity becomes a subject of international law when the international community wills it to be such, then it does not necessarily matter that the government exists formally or not since members of the international community use their discretion to either allow the entity to participate as a government or not.[41]

The State practice demonstrates that in international law it is possible for there to be a government of an autonomous region where the status of that region is not fully determined. Taiwan is a clear example of this for it declines to be a State. Taiwan has been described as a "consolidated local de facto government in a civil war situation."[42] Despite the fact that it is not a state it is submitted that it has a certain level of status in international law. Evidence of this is the fact that the its government is capable of entering into relations with other states, by for example the fact that it can be party to treaties and therefore can bind the People's Republic of China in relation to the area which it controls.[43]

Courts which have had to deal with the issue of the status of Taiwan have from a *de facto* point of view considered it to be a:

> "Well defined geographical, social and political entity (with)... a Government which has undisputed control of the island."[44]

State practice does not necessarily deny that recognition of a government can potentially be independent of recognition of statehood. The situation in Eritrea can also be submitted as evidence of this fact. After the Eritrean struggle for independence,

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[41] See section 1 on recognition in Chapter One.
[42] Crawford, *Creation of States*, at 149 - 150
[43] See Harris, *Cases and Materials* (5th Ed), at 104. For example, see Mutual Defence Treaty between the Republic of China and the United States of America 1954, 161 *British and Sovereign State Papers* 598, Article VI, cited in Crawford, *Creation of States*, at 145.
[44] *A.G. v Sheng* (1960) 31 *ILR* 349, cited in Crawford, *ibid.*, at 151.

which lasted for around 30 years, the Ethiopian army was finally defeated in 1991. A provisional Government was formed which for two years after taking office did not formally declare a state. The provisional government had limited diplomatic relations with other states, including some Arab States, some Western European States and some African States. The government was effectively in control of the territory. In 1993 there was an OAU/UN sponsored referendum where 99.7% of the population voted for independence. After this the international community came forward and recognised the statehood of Eritrea *de jure*. The context in which the provisional government was operating meant that it was much easier for it to have some level of international recognition prior to the referendum because the post-struggle new Ethiopian Government was supported by the Eritrean independence, thus issues such as intervention did not arise.[45]

The situation in Bosnia-Herzegovina and the state practice which occurred in relation to its recognition may also be instructive on this issue. It seems that at the time of recognition Bosnia-Herzegovina did not constitute a state as it did not fulfil all the criteria for statehood, since its recognised government only effectively controlled the minority of the territory. Recognition was then a substitute for the meeting of the criteria because despite its lack of effective government, through recognition a state was created.[46] Thus in state practice in the same way as lack of fulfilment of the criteria for a state will not necessarily preclude the recognition of a government, as in Eritrea, lack of effective government will not necessarily preclude recognition of a state.[47]

1.3: The international legal criteria for a national liberation movement

This is a difficult area to consider in terms of specific criteria as there are less examples in international practice of recognition of liberation movements than there are of states or governments. In addition the recognition that has been accorded has not necessarily been uniform in terms of at what stage in the movement's development, and why, it has been accorded.

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[45] Information from a telephone conversation with Mr. Abraha, Representative of Eritrea to London, the High Consulate of Eritrea, London, on 14 December 1998.
[46] Hillgruber, "The Admissions of New States to the International Community", at 493 - 4.
[47] Therefore the State practice is not necessarily compatible with the criteria laid down in the Montevideo

Also, as will be seen when the recognition which the Palestinian Representation has been accorded at the UN is considered below, there is a scale of status within this category itself and some groups are allowed to participate at a higher level than others.[48]

Broadly speaking however, contemporary international practice appears to widely support the notion that a liberation movement may be a subject of international law.[49] Cassese has stated that in deciding whether a liberation movement should be deemed a subject of international law the international community makes reference to two factual issues:

"Firstly, reference is made to the movement's political goals. Do the movement's goals fall within the scope of the principle of self determination; is the movement fighting a colonial power, foreign occupier, or racist regime? In addition, is the aim to acquire effective control over a population living in a given territory? Secondly the representative factor is called into account. Is the movement a legitimate representative of the oppressed people? Does it have a broad-based support among those it claims to represent."[50]

1.3.1: Do the movement's goals fall within the scope of the principle of self determination?

Under this heading only groups which are fighting to bring an end to colonialism, foreign occupation or racism can be entitled to international status as these are the situations which come within the principles of external self determination.[51] They must also be aiming to change the government of the State so that it reflects the wishes of the self determination unit from whom their claim to status stems. This raises the equally important issue of whether a group can claim status if they are not representative of the people on whose behalf they claim to act.

Convention since effective government is a requirement for Statehood.

[48] See section 2.1 below

[49] Lauterpacht, "The Subjects of the Law of Nations", at 444.

[50] Cassese, *Self Determination of Peoples*, at 166 - 167.

[51] See section 3.1.1 in Chapter One regarding the international claim to self determination for further description of those who may claim the right.

1.3.2: Broad support among those it claims to represent?

This can be a complicated issue since a number of questions presuppose the question of whether a group has broad support. Namely, who the liberation movement claims to represent and how it is possible to establish broad support when due to the lack of self determination the wishes of the people may have not been ascertained for perhaps many years?[52] Indeed, a people may all wish power in the state to change hands but may not all want the same group to represent them. This problem can be compounded if more than one group is making a claim for status. As was examined in the previous chapter in relation to the PLO, it is often the group which can best woo the international community which may achieve success on the international plane.[53]

The UN does attach great importance to the will of the people concerned, as without such emphasis the value of self determination is lost. To this end it has often organised plebiscites or supervised elections in non-self governing territories to ascertain the will of the people, although this has generally been to establish whether they aspire to independence or integration with another country, rather than to determine support for an individual group.[54]

It is not clear exactly what "Broad support" means in terms of precise levels support for a particular organisation. However there can be no doubt that it must be coupled with the political aims of the group and therefore a people's wishes in terms of goals will affect support.

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[52] See section 3.1.1 and 3.1.2 in Chapter One regarding who can claim the right to self determination and who is entitled to represent them.

[53] See section 3.2 in Chapter One regarding the importance of the quality of the claim to self determination and Section 2.1 and 2.2 in Chapter Two regarding the PLO and other competing claims to represent the Palestinians. Whilst the PLO does clearly have a good level of popular support it is far from beyond criticism in the Palestinian community and there are other rival groups who have achieved a certain level of support within Palestine and the rest of the Arab world.

[54] E.g.: British Togoland (General Assembly Resolution 1182 (XII)); British Northern Cameroons (General Assembly Resolution 1350 (XIII)); British Southern Cameroons (General Assembly Resolution 1608 (XV)); Rwanda-Urundi (General Assembly Resolution 1580 (XV)); Western Samoa (General Assembly Resolution 1569 (XV)); Cook Islands (General Assembly Resolution 2005 (XIX)); Equatorial Guinea (See UN Yearbook 1968, 741); Papua-New Guinea (General Assembly Resolution 2516 (XXXVIII)); New Zealand Territory of Niue (General Assembly Resolution 3285 (XXIX)); Ellice Islands (General Assembly Resolution 3288 (XXIX)); Northern Marianas (General Assembly Resolution 2160 (XLII)); French Comores Islands (General Assembly Resolutions (see D. Rouzie, 'Note' in (1976) 103 *JDI* 392 – 405. See also Cassese, *Self Determination of Peoples*, at 76 – 79. See also section 2.1.4 in Chapter One regarding the situation in East Timor where the UN arranged a plebiscite.

1.4: The International Legal Criteria for recognition as a Representative Group

This is an even more difficult notion to assess than that of the liberation movement and contains more scope for a varying degree of status within the category. Groups which claim to represent a people or a minority but which do not fit within Cassese's requirements noted in the previous section regarding "political goals" and "broad support" may be deemed to come within this category.

This might also include groups which are almost worthy of the title of liberation movement in terms of the recognition they have received, but are not likely to ever achieve statehood, perhaps due to their claims not falling within external self determination rules.

At the other end of the scale, however, this category may also include virtually unknown and completely internationally unrecognised groups which claim to represent minorities within States and are never likely to gain any level of international legal status.

Given below are examples of two groups which may be deemed to fall within this category - the Parti Quebécois in Quebec and the IRA/Sinn Fein in Northern Ireland. These are both groups which represent a significant yet minority group within Canada and Northern Ireland respectively. They have been chosen for brief examination here as they are well known, important groups which both clearly play a role in political processes but do not necessarily fall within the requirements for a liberation movement.

1.4.1: The Parti Quebécois

Quebec is one of the ten nations provinces of Canada. 80% of the population of Quebec are French speaking, whereas Canada overall is predominantly Anglophone. The Parti Quebécois was founded in the mid nineteen-seventies with the political goal of securing independence from Canada for the province. In 1976, with René Lévasque as its leader, the party gained control of the Quebec legislature. Lévasque promised a referendum on the secession issue which was held four years later. It resulted in a majority of "No"

votes.[55] In 1980 there was another referendum where only 40.5% of Quebec voters voted for "la Souveraineté".[56]

Since then there have been a number of agreements to attempt to give more autonomy to Quebec, however none have been successful.[57] In 1992 there was a further referendum within Canada on the Quebec issue and in Quebec itself there was a 54% "No" vote. In 1995 in another Quebec referendum, still only 49.4% of Quebec voters voted for independence.[58]

Currently the separatist Parti Quebécois is not the majority party within the Quebec legislature – the power is held by the Liberal party - however it does have a good deal of influence over political activities in Quebec, since one third of the electorate are declared separatists.[59] Its leaders use constitutional law and international law to support their claims to secession, however the validity of these legal arguments have been doubted.[60]

Therefore, given the results of the referendums in Quebec no-one would deny that there is a good level of support for the political goals of the Parti Quebécois. However, these goals do not fall within the external right to self determination as a minority of the population support them. This is because international law does not grant autonomous regions or States within a federal system the right to determine their international status, even if they as a matter of fact represent a section of the state which is ethnically or culturally different from the rest of the inhabitants.[61] The minority represented by the Parti Quebécois, whilst sizeable, is not sufficient to come within the criteria of "broad

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[55] 1,900,000 against secession and 1,300,000 for secession.
[56] 26 *Keesings Contemporary Archives* 30464A.
[57] For example, the Meech Lake Accord which was negotiated during the mid 1980s in Quebec was brought down by both Anglo-Canadian and Native-Canadian opposition: see Cassese, *Self Determination of Peoples,* at 249 – 250.
[58] (1995) 41 *Keesings Record of World Events* 40766.
[59] Cassese, *Self Determination of Peoples,* at 250.
[60] *Ibid.*, at 251. There was reference to the Court by the Canadian Governors in Council to the Supreme Court in Canada in 1998 regarding international law and possible secession of Quebec. The Governors asked to the Court to consider, (1) Can the Canadian Legislature, under the Canadian Constitution, effect the secession of Quebec unilaterally? To which the Court said "No"; (2) Does international law give the Legislature the right, through self determination to unilaterally effect the secession of Quebec? To which the Court gave a qualified "Yes" considering that there are other issues such as recognition by the international community which may also play a role in the future of that secession and (3) in the event of a conflict between domestic and international law which takes precedence? To which the Court stated that it would not consider this question in this particular reference. Reference Re: Secession of Quebec (1998) 2 *Supreme Court Reports* 217.

support" (as discussed above) and therefore the party may not be classed as a national liberation movement. However, it clearly represents a significant minority within Quebec, hence its classification as a representative group.

1.4.2: The IRA/Sinn Fein

The IRA is Northern Ireland's biggest republican paramilitary group. It was founded about 80 years ago and its aim is to unite Northern and Southern Ireland. In 1969 the IRA split into the Official and Provisional wings. The Provisional IRA is the more militant of the two groups and is generally referred to as the IRA. Although the Official IRA still exists it is less active.

Sinn Fein is one of the political parties which claims to represent the views of a section of the Northern Irish electorate. It has always been generally thought of as the political wing of the IRA, however the party deny that this connection exists. Like the IRA, Sinn Fein is a republican group which is keen to establish a united Ireland.

The party dates back to before the First World War, however its current form was developed in 1970 when Provisional Sinn Fein split from Official Sinn Fein. This split mirrored the division of the IRA mentioned above.

During the 1980s Sinn Fein grew in strength and at the 1997 UK General Election it won 16% of the Northern Irish vote and returned two MPs to Westminster.[62] In the recent UK General Elections in 2001 Sinn Fein increased its representation at Westminster to four MPs.[63]

At the 1999 elections to the devolved Northern Irish Assembly[64] Sinn Fein was elected to 18 seats. The electoral system used was Single Transferable Vote which is a highly proportional method and therefore it can be said that overall Northern Irish support for

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[61] See, Cassese, *ibid.*, chapters 2 and 4.
[62] Gerry Adams and Martin McGuinness. Neither have ever sat at Westminster as they refuse to take an oath of allegiance to the Monarch.
[63] Gerry Adams, Pat Doherty, Michelle Gildernew and Martin McGuinness.
[64] See Northern Ireland Act 1998 which established the 108 seat Assembly and also the Northern Ireland Act 2000 which removed the power of the Assembly due to a failure to decommission IRA weapons

Sinn Fein is likely to stand at around 17% of the population.

Therefore Sinn Fein and the IRA are groups which represent a minority of their population. This means that they cannot be classed as falling within Cassese's criteria of broad support and political goals, however they nonetheless represent a significant proportion of relevant popular views and have achieved a certain level of political success. Therefore they can be considered as a Representative group upon the scale of possibilities.

Now that the main possibilities of status have been considered this study turns to the status of the Palestinian Representation. Various examples of recognition within a range of fora will be examined in order to determine when and where it has fallen on the spectrum of possibilities and therefore to what extent it is a body which possesses a variable level of personality.

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within a specified time frame.

2: HOW HAS THE INTERNATIONAL COMMUNITY TREATED THE PALESTINIAN REPRESENTATION?

The question which needs to be asked is how the international community has treated the Palestinian Representation? As discussed briefly at the beginning of Chapter Two, since the Palestinian situation is a politically divisive issue it can be difficult to assess acts of recognition enabling the Palestinian Representation to participate in the international community objectively.[65] It is important to consider whether States have not allowed Palestinian representatives not to participate simply on the grounds that Palestine is not officially a State or whether in fact they have adapted to allow participation. Following on from this it can be examined why the international community has taken such a stance on Palestinian participation. This discussion being built upon the conclusions in Chapter Two regarding the strong right of Palestinians to self determination and also a realisation that the State of Palestine is likely to exist at some time in the future and that as a result therefore needs some level of representation on the international plane.

- **What do the PLO and the PA claim to be?**

First, it is necessary to consider what the entity in question purports to be and it is with this issue that this examination begins. The position of the PLO, though perhaps somewhat obvious, is worth quoting. It was made particularly clear when the PLO chairman, Yasser Arafat addressed the UN General Assembly in 1974.[66] Arafat referred to the PLO as the "sole legitimate representative of the Palestinian people". Then in 1988 the Palestinian National Council (the legislative wing of the PLO) claimed to be the government of the State of Palestine when it unilaterally declared the existence of the State of Palestine –

"The Palestine National Council hereby declares, in the name of God and on behalf of the Palestinian Arab people, the establishment of the State of Palestine" [67]

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[65] See section 1.1 in Chapter Two.
[66] General Assembly Official Records, XXIXth Session, 2282nd Meeting, A/PV.2282 and Corr. 1 paras. 63 – 6 are of particular interest.
[67] Palestinian National Council Declaration of Independence.

Since that time, the PA has come into being through the DOP.[68] Therefore, now the PA would be considered to be the governmental style body for the West Bank and Gaza Strip and indeed the degree to which it exercises some governmental style functions is considered below. This raises problems of exactly when a government may be classed as such.[69] Any recognition which is discussed in the following sections which occurred before 1993 and the DOP can be assumed to be in relation to the PLO, unless it is stated otherwise. Recognition post 1993 is often aimed at the Palestinian cause more generally (the PLO and PA being representative bodies of that cause) and it would be up to the relevant body within the PLO or PA framework to decide exactly which Palestinian body would undertake the task of representation.[70]

However, not all entities which recognise the Palestine or its Representatives do so for the same range of purposes and therefore it may be recognised as having different levels of status in different scenarios. This demonstrates the importance which should be placed on the context of recognition and shows that an entity may have more than one dimension to its status depending on which other entities it is interacting with at any one time.

Therefore, prima facie an entity may be able to occupy more than one category of status, (like for example, national liberation movement or government) at any given moment. Thus, in reality the situation which may occur is that the Palestinian Representation is recognised as being at different places on the scale of possibilities by various other international actors.

2.1: Recognition by the United Nations

One way in which to assess the international impact of a representative group is to look at the way in which it has been treated at the UN. Whilst it is generally agreed amongst

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[68] As discussed in section 2 of Chapter Two.

[69] See section 1.2 above on recognition of governments.

[70] See PLO/PA Organisational Chart in Appendix I. (It should be remembered that the PLO would generally take on the task of representing at an international level as it represents all Palestinians (even though it has recently focussed on the creation of state in the West Bank and Gaza Strip and that this would therefore affect predominantly the Palestinians who already reside there). The PA however is the

jurists that recognition by the UN does not automatically imply recognition by its individual members[71], it can be said that it provides evidence of the level of status which that movement has accrued.[72]

As it is not a State, Palestine has not been accorded the status that a fully fledged member would be given. However, this has not stopped the UN granting some level of status to Palestinian Representatives. For indeed, lack of Palestinian Representation at the UN would be incompatible with the UN's stance on Palestinian self determination.[73]

The PLO was granted the status of observer in 1974.[74] This status has changed somewhat since that time and the UN has allowed the personality of the representation to evolve alongside changes in its make-up and aims which has on occasion meant that it has fallen more in line with accepted international opinion.[75]

However, in order to understand the importance of such a grant of observer status a brief examination of the nature of observer status at the UN should first be considered.

2.1.1: The Nature of Observer Status at the United Nations

Observer status at the UN has been granted on an *ad hoc* basis. It is a device which allows non-member States, organisations, groups and national liberation movements to have a meaningful relationship and participate at varying levels in the activities of the Organisation. The precise specifications of observer status cannot be given since the

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internal governmental style entity which represents those within the areas its franchise extends to.

[71] See *inter alia*, Aufricht, "Principles and Practices of Recognition by International Organisations" (1949) 43 *AJIL* 679; Kato, "Recognition in International Law: Some Thoughts on Traditional Theory, Attitudes and Practice by African States" (1970) 10 *Ind. JIL* 299; Wright, "Some Thoughts About Recognition" (1950) 44 *AJIL* 548. This is not to argue that the UN does not play a role in the recognition of entities (see, Dugard, *Recognition and the UN*, at footnote 9 in chapter 4 where a worthy examination of collective recognition regarding the UN is expounded both theoretically and through practice) but simply to suggest that collective recognition through the UN is still not a viable determinative option. Cf. Green, "Representation Versus Membership: The Chinese Precedent in the United Nations" (1972) 10 *Can. YBIL* 104 and Alexandrowicz, "The Quasi-Judicial Function of States and Governments" (1952) 4 *AJIL* 631.

[72] See also, Claude, "Collective Legitimization as a Political Function of the UN" (1966) 20 *Int. Org.* 367.

[73] See Chapter Two.

[74] General Assembly Resolution 3210 (XXIX), 14 October 1974. (Voting: 105:4:20. Bolivia, Dominican Republic, Israel and the United Kingdom against).

[75] See discussion below regarding the increased international support after the PLO renounced its tactics of violence and it recognised the right of the State of Israel to exist in the DOP.

UN has never formally defined the relationship and it has been used as and when the need to involve a non-member has arisen, often due to political considerations.[76] Therefore an examination of what role the observer plays at the UN must be undertaken,

> "since the role is based on usage, not legal prescription, its meaning must be found in the behaviour, privileges, and liabilities of observer countries as they actually function at United Nations headquarters".[77]

Traditionally such status was generally granted to non-member states. However since the mid-1970s NLMs have been granted some limited participation in the activities of the UN. Observer members are not given the same rights as states and an observer so far has never been allowed to vote. The rights granted can vary according to the situation and the UN can increase the extent or number of rights should it consider it necessary. This is amply demonstrated by Resolution 250 of the 53rd Session of the General Assembly which conferred extra "unprecedented" rights on the Palestinian Observer Delegation and is discussed below. [78]

Practically, observer status means that a non-member government (for example) can be involved in forum where international affairs are being discussed and decisions, perhaps relating to their own situation, are being considered. Since now many observers have the right to speak in discussions, for some only those regarding their own situation, they can even have an indirect impact on that decision making.

Whilst increasing the rights and privileges of the body to which status is granted, the endowment of observer status also has some limitations. Observers are not able to

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[76] See, Sybesma-Knol, "The Continuing Relevance of the Partcipation of Observers in the Work of the United Nations" from Wellens (Ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff Publishers) (1998) 371; Mower, "Observer Countries: Quasi-Members of the United Nations" (1966) 20 *Int. Org.* 266, at 272. Although, since the participation of liberation movements as observers it could be said that political considerations include the pursuance of the right to self determination.
A further important issue to note in relation to observer status is that whilst it is not argued that collective recognition through the UN is akin to recognition by states on an individual basis, it can provide evidence of state intention. There is an academic debate as to whether recognition can be implied through resolutions of international organisations. See Harris, *Cases and Materials* (5th Ed.), at 147 for brief overview of the modes of recognition.
The nature of observer status was also considered in the Advisory Opinion, Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (1988) *ICJ Rep.* 12 see, The Contents of the Dossier transmitted by the Secretary General of the United Nations, part II, Materials Relevant to the Observer Status of the Palestine Liberation Organisation, *Pleadings, Oral Arguments, Documents,* at 87 – 107.

[77] Mower, "Observer Countries: Quasi Members of the United Nations", at 267.

[78] General Assembly Resolution 250 (LII), 7 July 1998 (Voting 124:4:10). See section 2.1.3 below.

participate in the distribution of UN communications in the same way a member can and since many observers are not able to speak if an observer is attacked in debate it may be unable to defend itself through reply.[79] As stated above the status of observer has been developed on an *ad hoc* basis, however on the whole observers speak only after Members States have spoken,[80] and have varying degrees of participation in terms of rights of reply, sponsorship of proposals and other procedural issues.[81]

2.1.2: Palestinian Representation at the UN

The PLO was the first NLM to be extended the privilege of observer status through a resolution of the General Assembly, by which a Palestinian representative was entitled to participate in plenary meetings on the question of Palestine.[82] In a further resolution, later that same year the PLO itself was invited to be an observer of the work of the General Assembly.[83]

When the PLO's claim to represent the Palestinians is considered, it should be remembered that, "...it is clear that this representation of a people does not preclude

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[79] cf: the Palestinian Delegation - see below section 2.1.3 regarding Resolution 250.

[80] See "Practice of the General Assembly and Its Main Committees Regarding Statements Made by Observers" from Chapter VI: Selected Legal Opinions of the Secretariats of the UN and Related Intergovernmental Organisations (1982) *UN Jur. YB*, at 160.

[81] See "Status of the PLO in the UN – Summary of the Principal Developments in the Evolution of the Status of the PLO with the General Assembly, the Security Council, the Economic and Social Council, Other UN Agencies and Intergovernmental Organisations" from Chapter VI: Selected Legal Opinions of the Secretariats of the UN and Related Intergovernmental Organisations (1982) *UN Jur. YB*, at 156–159.

[82] General Assembly Resolution 3210 (XXIX), 14 October 1974 (Voting: 105:4:20. Bolivia, Dominican Republic, Israel and the United Kingdom against). It is interesting to note the Israeli and UK votes since they are traditionally states which have been less politically inclined to support increased rights for Palestinians. Given the historical relationship between the Palestinians and both the British and the Israelis discussed in Chapter Two this is not surprising.

[83] General Assembly Resolution 3237 (XXIX), 22 November 1974 (Voting: 95:17:19. The 17 States against PLO participation in the General Assembly were: Belgium, Bolivia, Canada, Chile, Costa Rica, Denmark, Germany (FRG), Iceland, Ireland, Israel, Italy, Luxembourg, Netherlands, Nicaragua, Norway, UK, USA). It vital to note that with the exception of Israel, these States are Western European or within the Americas. When this is compared with the responses to the letters (see Appendix III) and the 95 States which recognised the State of Palestine in 1988 it can be seen that these two groupings are politically similar in their response to the sovereignty of the Palestinians.
The 19 States which abstained were: Australia, Austria, Bahamas, Columbia, France, Greece, Haiti, Honduras, Jamaica, Japan, Laos, Malawi, New Zealand, Panama, Paraguay, Swaziland, Sweden, Thailand, Uruguay. Once again, with the exception of two States from Australasia, two from Asia and two States from Africa, all the others are from either Europe or the Americas, thereby demonstrating the continental splits regarding the Palestinian question.

other movements from representing the same people."[84] However, in organisations such as the UN, it is general practice that each group (or state or people) should be represented by one group – usually the government of that particular people or state. It has already been shown in Chapter Two that the PLO and the PA are considered to be the legitimate representatives of the Palestinians.[85] It would be very difficult, given the procedures of that organisation, to suggest that more than one group could represent the defined people struggling for liberation. Therefore, here the question of who should represent the Palestinians in the UN is not a great issue.

The practice of inviting liberation movements to participate in some UN activities continued after the initial invitation to the PLO. Together with assistance from the OAU and later the Arab League, the General Assembly classified three kinds of NLM which were eligible for such recognition - those under "colonial domination, alien occupation and racist regimes."[86] A clear example of an invitation such as this is the resolution which allowed liberation movements which had been recognised by the Organisation of African Unity (OAU) to join in work which related to their countries[87]

It has been suggested that the category of "peoples fighting against alien occupation" was created specifically for the Palestinian situation.[88] If so, this is certainly strong evidence of the will at the UN to involve the Palestinian representation more fully in their activity. Furthermore, the status granted to the PLO was greater than that accorded to the OAU recognised movements. The difference lay in the fact that the PLO was able to participate in areas which went beyond the context of Palestine, whereas as mentioned above the OAU recognised groups only participated in work related to their situation. However, "In practice, the PLO has limited its participation to issues relating to Palestine."[89] This is evidence that as early as the mid-1970s it was possible to view

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[84] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 121.
[85] See section 3.3 in Chapter Two.
[86] Freudenschuss, "Legal and Political Aspects of the Recognition of National Liberation Movements" (1982) 11 *Millennium Journal of International Studies* 115, at 116.
[87] General Assembly Resolution 3280 (XXIX), 10 December 1974 (adopted by consensus). See also section 2 in Chapter One which considers the grant of observer status to some NLMs and also the influence of the OAU. The basic criteria which the OAU used for recognition of National liberation movements was effectiveness of struggle, coupled with popular support. They are applied fairly carefully, as evidenced by the withdrawal of recognition in 1964 from the FNLA of Angola for no longer meeting the criteria: see, Shaw, "The International Status of Liberation Movements", at 23 and note 16.
[88] See Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law" (1975) 16 *HILJ* 12.
[89] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 119.

the PLO as a more advanced movement which was potentially able to participate in work on any issue, unlike the other NLMs whose observer grants were more limiting.[90]

The distinction between the OAU recognised movements and the PLO at the UN can also be seen in the practice of the organisations as well as in its resolutions. For example, in 1974 there were calls by some States who supported the liberation of Guinea for the leader of the PAIGC[91], Amilcar Cabral, to be able to make a declaration before the General Assembly. However they were unsuccessful. Despite this, Yasser Arafat was *invited* to address the Assembly that same year. He gave a speech lasting an hour and forty minutes and symbolically was seated in a place that was usually reserved for Heads of State.[92]

Thus through its participation in the life of the UN the PLO clearly paved the way for the SWAPO which just over two years later in 1976 was given the opportunity to join in plenary sessions of the General Assembly.[93]

This lead and marking out of the PLO as different from other movements continued in the Security Council as well as the General Assembly. In December 1975 the Council invited the PLO to participate in the consideration of an issue which would have condemned Israel for air attacks on Palestinian Refugee Camps in Lebanon.[94] Prior to this some representatives of African liberation movements had taken part in Security Council discussions by virtue of Rule 39 of the Council's Rules of Procedure, which allows the Council to invite members or other persons whom it 'considers competent' to assist or give information during meetings.

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[90] For example, for the African Portuguese territories, FREMILO, MPLA, FNLA, UNITA and for Southern Rhodesia, ZAPU, ZANU – See *ibid.*, at 120.
[91] A movement struggling for the liberation of Guinea. For a basic description of the history of PAIGC see Wilson, *ibid.*, at 111 – 112.
[92] Hirst, *The Gun and the Olive Branch: The Roots of Violence in the Middle East* (London: Faber and Faber) (1977), at 333; also cited in Burke, *International Recognition of a Non-State Nation*, at 76.
[93] See section 2.1.2 in Chapter One regarding SWAPO and General Assembly Resolution 152 (XXXI), 20 December 1976. (Voting: 113:0:13. The abstaining States were Belgium, Canada, Denmark, El Salvador, France, Germany, Ireland, Italy, Luxembourg, Netherlands, United Kingdom, USA, Uruguay). It is interesting to note that with the exception of El Salvador, the abstaining States here also either voted against in the Resolution which granted the PLO observer Status in 1974 discussed above. Again, they are all from Western Europe or the Americas.
[94] 30 *SCOR* 1859th meeting (1975) 3.

When the PLO was invited to attend, the procedure for invitation was carried out under the authority of Rule 37, which states that any UN member which is not a Council member may be invited to take part in discussion without the need for a vote if the interests of the member are affected by the issue at hand.

The majority of the Council was clear that the PLO should participate with the same rights as conferred on a member state, however, there was some dissent on this issue.[95] Nine members voted in favour, three against, with three abstentions, voting followed fairly predictable political lines with the United States, the United Kingdom and Costa Rica against. The United Kingdom stated that:

> "the granting to the PLO of this exceptional status...constitutes an undesirable and unnecessary departure from the established practice of the Security Council. The provisional rules of the Council provide only for Member States of the Organisation to enjoy such treatment."[96]

The resolution was passed despite the votes against since the President considered it to be on a procedural, rather than a substantive matter.[97] This was an important decision as far as the PLO were concerned since it could be said that it implies that the concept of Palestine as a full member is not necessarily an impossibility and that a majority of the Security Council gave the PLO greater privileges than other observers.

However, Rule 38 of the Provisional Rules of Procedure of the Security Council governs the rights which a member invited under Rule 37 is granted. They include the right to submit proposals and draft resolutions. Such drafts may only be put to a vote if a representative of the Council requests it. Whilst this may seem like a reasonably high level of participation, particularly for an observer such as the PLO, it is true to say that the effect of such participation on substantive issues is surely limited. This is because through taking a political stance they would be likely to be subject to a permanent member's veto (although this perhaps would not be as predictable in the current political

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[95] For further description of this occasion see, Gross, "Voting in the Security Council and the PLO" (1976) 70 *AJIL* 470, at 475 – 482; Levine, "A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order" (1981) 10 *DenverJILP* 243, at 243 - 246; and Travers, "The Legal Affect of United Nations Action in Support of the Palestine Liberation Organisation and the National Liberation Movements of Africa" (1976) 17 *HILJ* 561, at 572 – 573.

[96] 30 *SCOR* 1859th meeting (1975) 3, at 38 - 40, also cited in Levine, *ibid.*, at 243 - 244

[97] *Ibid.*, at 41. Levine questions the validity of the adoption since the second part of the resolution was substantive, (at 244) and Gross, "Voting in the Security Council and the PLO", suggests that to declare that a non-state may be treated as a state is an *ultra vires* action on the part of the Council, (at 479).

climate). Nonetheless, this was an important step for the PLO, especially as it had only been granted observer status the previous year.

This style of invitation to the observer for Palestine to join in the discussion at the Security Council continued and when Palestine was invited it was generally under Rule 37. However, there is always some dissent as to this practice.[98] The United States always votes against and strong American allies, the United Kingdom and other Western European States always abstain. The lack of American willingness to allow the Palestinian Representatives to participate under Rule 37 is because of a concern that it would amount to *de facto* recognition to a representative of the nation of Palestine.[99] This once again is indicative of the varying light in which the Palestinian representation is held by differing members of the international community.

A further example of this type of voting split on the issue of Palestinian participation in the Security Council occurred in 1990. The Council was due to discuss the situation in the occupied territories and some members wanted Yasser Arafat to attend the meeting in New York.[100] The United States made known its intention to refuse him a visa to enter America, so the Security Council moved the venue for its 2923rd meeting to Geneva.[101] The vote regarding Arafat's attendance followed typical political lines – 11 votes to 1 (USA) and 3 abstentions (UK, France, Canada).[102] Since this was a procedural rather than a substantive vote the USA did not have the power of veto and therefore Arafat did address the meeting.[103]

In recent years however, there has been an alteration in wording of the invitation for the Permanent Observer for Palestine to participate in Security Council meetings so that the Rule 37 issue is not so pointed. On 28 February 1994 an invitation was granted to

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[98] By way of example: At the 2973rd, 2980th and 2989th meetings the United States voted against and Belgium, France and the United Kingdom abstained.
At the 2910th, 2845th and 2863rd meetings the United States voted against and the United Kingdom, Canada and France abstained.
At the 2781st meeting the United States voted against and France, Germany, Italy and the United Kingdom abstained.

[99] *Washington Post* 11 January 1989 Sec. A. 14, cited in Talmon, *Recognition of Governments in International Law*, at 89.

[100] A representative of Bahrain wrote to request this: letter dated 21 May 1990, S/213000.

[101] S/21309, 22 May 1990.

[102] *SCOR*: 45th Year, at 5 – 6.

[103] See the discussion of this occasion in Bailey & Daws, *The Procedure of the UN Security Council* (Clarendon Press: Oxford) (3rd Ed.: 1998), at 43.

Palestine to participate "in accordance with the rules of procedure and the previous practice in this regard."[104] For the first time the USA did not object to participation and therefore ever since this wording has been used.[105] It is interesting to note that this change in attitude by the United States came after the DOP. This indicates the importance of the DOP in terms of the Palestinian Representation's acceptance at an international level, even by States which have traditionally opposed extending Palestinian participation in the life of the international community. At a bilateral level it is a clear example of the evolving relationship between Palestinian Representatives and the USA.

The delegation of Palestine at the UN is also involved with the working of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). In 1994 the General Assembly decided that the Advisory Commission of UNRWA should establish a working relationship with the PLO. The PLO now often shares in meetings with the Advisory Commission and a copy of the annual draft report of UNRWA's Commissioner General is "shared" with a representative.[106] It should be noted, however, that despite the "sharing" of the report with the Palestinian representative, the PLO is not accorded the same status as the representative of the Government of Israel, whose comments on the report are given "due consideration" by the Commissioner General. [107] This is a good example of the fact that even in a relatively 'Palestinian sympathetic' scenario, a distinction is still drawn between the representative of a liberation movement and the government of a state.

It is interesting to note the General Assembly Resolution of 15 December 1988 where the UN responded to the proclamation of the State of Palestine by the Palestinian National Council. [108] That Resolution 'acknowled[ged]'[109] the proclamation and

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[104] S/PV. 3340, 28 February 1994.
[105] See, Bailey & Daws, *The Procedure of the UN Security Council*, at 160.
[106] See, Letter from Peter Hansen the Commissioner General of UNRWA to the President of the General Assembly in the Report of the Commissioner General of the UNRWA for Palestinian Reuses in the Near East. 1st July 1995 - 30th June 1996 *GAOR* 51st Session, Supp. 13.
See also the letter from Peter Hansen the following year - *GAOR* 52nd Session, Supp. 13.
[107] Letter from Peter Hansen 51st Session, *ibid.*
[108] General Assembly Resolution 177 (XLIII), 15 December 1988 (Voting: 104:2:36 The United States and Israel against. The 36 abstaining States were, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Bhutan, Canada, Central African Republic, Costa Rica, Cote D'Ivoire, Denmark, Finland, France, FRG, Greece, Iceland, Ireland, Italy, Japan, Lesotho, Liberia, Luxembourg, Malawi, Nepal, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Trinidad and Tobago, UK,

decided that the designation "Palestine" would be used in the UN system in place of "PLO" from then on. This was a symbolic victory for the PLO and the Palestinians as the notion of Palestine was accepted even if the political actualities of such a concept were not on the horizon.

As a result of its role as observer the PLO has been a party to a case in the courts of the United States of America. The United States challenged the right of the PLO to maintain its observer mission in New York which it is permitted to do under the terms of the *Agreement between the USA and the United Nations Organisation regarding the Headquarters of the United Nations, 1947.* The challenge was brought on the grounds of the Congressional enactment of the Anti-Terrorism Act 1987.[110] This Act overruled the provisions of the Headquarters Agreement and it was questioned whether as a result the PLO would not be able to maintain their Permanent Observer Mission Offices in New York.[111] The court held that the statute did not override the Headquarters Agreement since there was no explicit intention expressed on the part of Congress to that effect. It is important to note, however that regardless of the issues in the case itself there was no recognition of the PLO as having status in international law other than through the observer status it receives at the UN. The court referred to a congressional determination which stated that, "...the PLO and its affiliates are a terrorist organisation and a threat to the interests of the United States, its allies and to international law..."[112]

Uruguay, Venezuela, Zaire). It should be noted that 32 of the 36 abstentions were from States which did not recognise the State of Palestine at a bilateral level in 1988 and that 84 of the 104 affirmative votes were from States which had recognised Palestine bilaterally (see Appendix II for list of States which did). Of those 20 States which had not recognised Palestine at a bilateral level, yet still voted in favour of this resolution, 12 of them were from the Americas, 6 were from Asia, 1 was from the Middle East and 1 from Africa. This reflects the patterns of support which can be seen when most examples of Palestinian recognition or opposition are examined.

[109] General Assembly Resolution 177, *ibid.*, at para. 1.

[110] 22 USC Sections 5201 - 3. For discussion regarding the case and also regarding the conflict between United States national and international law see, Horne, "United States v Palestine Liberation Organisation: Continued Confusion in Congressional Intent and the Hierarchy of Norms" (1989) 10 *Mich. JIL* 935.

[111] United States v The Palestine Liberation Organisations and Others 82 *ILR* 282.

[112] *Ibid.*, at 299; Appendix A: Title 22, United States Code (Foreign Relations) Chapter 61 - Anti-Terrorism - PLO , section 5201 (b).
Currently the United States has designated 28 groups around the world as foreign terrorist organisations which means that they are classed as non-US organisations that engage in terrorist activity that threatens US nationals or national security (see definition in the Antiterrorism and Effective Death Penalty Act 1996). A list of Foreign Terrorist Organisations is published in the Federal Register. The PLO is not one of the organisations currently designated, however there are other Palestinian groups which are. Foreign Secretary Madeline Albright designated 28 groups as Foreign Terrorist Organisations on October 8 1999, they are: Abu Nidal Organisation, Abu Sayyaf Group, Armed Islamic Group, Aum Shinrikyo, Basque Fatherland and Liberty, Gama'a al-Islamiyya, Hamas, Harakat ul-Mujahideen, Hizbullah, Japanese Red Army, al-Jihad, Kach, Kahane Chai, Kurdistan Workers' Party, Liberation Tigers of Tamil Eelam,

On 2 March 1988 the General Assembly resolved to request an advisory opinion from the International Court of Justice on the *Applicability of the Obligation to Arbitrate under s21 of the United Nations Headquarters Agreement of 26 June 1947.*[113] The Court was required to establish mainly whether, given that the USA could not guarantee that the PLO Observer Mission would not be affected, a dispute between the UN and the USA concerning the interpretation and/or application of the Headquarters Agreement existed and thus the USA would be required to enter into the pre-arranged dispute settlement mechanisms.[114]

The Court was not actually called upon to consider the legal question underlying the Anti-Terrorism Act – i.e.: that if it became law the USA would be in violation of the Headquarters agreement. However, some passages of the Case do suggest that the USA was under a duty not to interfere with the PLO Observer Mission as its legality was not in question.[115] The Court opined that that a dispute did exist between the UN and the USA and that there was an obligation upon the USA to enter into arbitration.[116]

On the whole however, the judgment of the Court does not lead directly to conclusions relevant to this study - other than to reaffirm the status of Palestinian Representatives as permanent observers and their right to maintain a permanent mission in New York. However, a general conclusion may be drawn from the fact that no other UN members chose to stand with the USA and support them in their action. This could be taken to suggest that other members support the Palestinian participation in UN activities.

As has been already demonstrated through the USA's change in reaction to Palestinian participation in the Security Council, the USA's stance has changed considerably over

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Mujahedin-e Khalq Organisation, National Liberation Army, Palestine Islamic Jihad-Shaqaqi faction, Palestine Liberation Front – Abu Abbas, Popular Front for the Liberation of Palestine, Popular Front for the Liberation of Palestine- General Command, Revolutionary Armed Forces of Columbia, Revolutionary Organisation 17 November, Revolutionary People's Liberation Party/Front, Revolutionary People's Struggle, Shining Path and Tupac Amaru Revolutionary Movement. For discussion regarding the consequences of designation see, "Contemporary Practice of the United States" (2000) 94 *AJIL* 364.

[113] General Assembly Resolution 229 (XLII), 2 March 1988.

[114] Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (1988) *ICJ Rep.* 12.

[115] See separate opinion of Judge Schwebel in particular at page 52. For a discussion of the Case see also, Sybesma-Knol, "The Continuing Relevance of the Participation of Observers in the Work of the United Nations", at 381 – 384.

[116] *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters*

the last decade. However the fact that the USA wanted to close the permanent mission in New York is a good example of the different light in which the PLO was held by the United States compared to other more politically sympathetic bodies.[117] The PLO was not even considered as a liberation movement in this sphere, however such non-recognition is most likely political. Perhaps as a result of the PLO tactics of violence at the time and the USA's relationship with Israel.[118] This is interesting since it suggests that personality is clearly evolutionary and that it is also affected by political context. However, it also indicates that status can be variable in the sense that one entity may consider the Palestinian Representatives to be undesirable and therefore try to limit its participation. At the same time other entities are attempting to secure Palestinian participation in the international community.

It is also interesting to note that the UN has played an important role in the Israeli/PLO peace process by giving international approval to both the process itself and the decided aims of the DOP. General Assembly Resolution 48/58[119] "Expresses full support" for the process and was almost adopted by consensus with only four States voting either against or abstaining.[120]

2.1.3: Recent Changes for the Palestinian Delegation at the United Nations

The status of an entity is clearly affected by the roles it plays, and perhaps more accurately, those roles it is legally and politically granted the ability to play. Therefore, it is important to also consider the recent changes in the way in which the Palestinian representatives are able to participate in the work of the UN. Although there is not yet sufficient evidence available to state exactly how these changes will practically affect the Palestinian representation at the UN and the PLO, it is necessary to examine the

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Agreement of 26 June 1947 (1988) *ICJ Rep.* 12, at para. 58.

[117] See for example the discussion regarding the PLO's relationship with the United States of America in, chapter 6 "The PLO and the International Community" of Nassar, *The PLO: From Armed Struggle to Declaration of Independence.* See also section 1.1 in Chapter Two.

[118] United States v The Palestine Liberation Organisations and Others 82 *ILR* 282, at 299. Appendix A: Title 22, United States Code (Foreign Relations) Chapter 61 - Anti-Terrorism - PLO , section 5201 (a). In section (a) examples of PLO violence against American citizens and diplomatic agents are cited as evidence for the determination of it as a terrorist organisation.

[119] 14 December 1993.

[120] Voting: 155:3:1. (Iran, Lebanon and Syria against and Libya abstained – again an example of the political groupings within the UN as anti-Israeli States failed to affirm this resolution).

changes listed in General Assembly Resolution 250, 7th July 1998 [121] in order to determine how they have affected their status.[122] Such an examination is important in assessing the degree to which the Palestinian Representatives' status have varied since their initial invitations to participate in the work of the UN.

Resolution 250 is interesting and crucial both in terms of the Palestinian delegation and the concept of observer status. It is crucial to the Palestinian representation since it increases the level of its participation and recognises it as being qualitatively different from other observer groups at the organisation. It is interesting in relation to the concept of observer status because in effect it creates two differing levels of observer; general observer and super observer. These differing levels have correspondingly differing levels of involvement in UN activity.

It is also important to consider whether this unprecedented action by the UN can be used as a model for other potential future national liberation movements and observers claiming a certain level of status in international law. The resolution must be an example of the potential status they may aspire to and demonstrates that despite not being a full state a reasonable level of participation in a respected and legitimate international body is attainable. Resolution 250,

"Decides to confer upon Palestine, in its capacity as Observer and as contained in the Annex to this resolution, additional rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations as well as in United Nations conferences."

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[121] General Assembly Resolution 250 (LII), 7 July 1998. (Voting: 124:4:10). On the whole this was a strong signal that Palestine's new status at the UN was well supported and necessary. This change in status had been called for by some members of the United Nations. See for example the statement by Mr Chodhury the representative for Bangladesh - *GAOR* 52nd Session, 58th plenary meeting, 1 December 1997, at 11.
There is a note from the Secretary-General in relation to the working of resolution 250 at A/52/1002, 4 August 1998, Agenda Item 36.
However, the voting still followed fairly predictable political lines – the States which voted against the resolution were: Israel, Marshall Islands, Micronesia and USA.

[122] Prior to Resolution 250 the PLO already was able to make oral statements, reply to statements, have written statements or documents circulated but was excluded from voting, sponsoring substantive proposals, amendments or procedural motions, from raising points of order or challenging rulings made by the Chairman. These rights exceeded the rights of other observers – see, "Participation of the PLO in the 'Sessions and Work of the UN' Under General Assembly Resolution 3237 (XXIX) – Limits to the PLO Entitlement to Observer Status in Subsidiary Organs of Limited Membership – Discretion of Such Organs, in the Absence of Instructions to the Contrary from the Establishing Authority, To Decide Questions of Participation by Non-Members, Including Participation in Closed Meetings – Extent of Observer Participation in the Light of the Practice of Main Committees of the General Assembly", from Chapter VI: Selected Legal Opinions of the Secretariats of the UN and Related Intergovernmental Organisations, (1980) *UN Jur. YB*, at 188 – 189.

The Annex to the Resolution then goes on to grant various rights "without prejudice to the existing rights, privileges and practice:" The Palestinian representatives are thus enabled to participate,

> "in the general debate of the General Assembly"; "have the right of inscription on the list of speakers under any agenda items other than Palestinian and Middle East issues at any meeting of the plenary"; have "the right of reply"; "the right to raise points of order related to the proceedings on Palestinian and Middle East issues"; "the right to co-sponsor draft resolutions and decisions on Palestinian and Middle East issues" and "the right to make interventions, with a precursory explanation or the recall of relevant General Assembly Resolutions being made only once by the President of the General Assembly at the start of each session of the Assembly".

These rights referred to above, however helpful to the Palestinian cause and inclusive of the Palestine representatives, do not by any means place Palestine on an equal footing with other member states of the organisation. Indeed the resolution is not silent on this issue and makes is abundantly clear that this is not its aim. There is a definite hierarchy within the structure of the organisation which is mentioned within the resolution. The Annex details the "right of inscription on the list of speakers..." coming "...after the last member state on the list of that meeting". It also provides that despite the "right to co-sponsor draft resolutions and decisions on Palestine and Middle East issues, such resolutions and decisions shall only be put to a vote upon request from a Member State." This hierarchy is perhaps crudely, but effectively illustrated by point seven in the Annex which notes, "Seating for Palestine shall be arranged immediately after non-member states and before other Observers."

The previous sentence, however, also graphically depicts the newly enhanced position of the Palestine over and above other Observers and thus also over all other bodies and representatives pushing for liberation of people and territory in terms of its international status. Actions such as this by the UN are evidence of the success of the PLO as a liberation movement and exemplify the distance it has travelled since its inception in 1964 to the body behind the representation of a "super-observer", which comes second only to full member states in large international organisations. Indeed, the "upgrade" which Palestine received through this resolution has been hailed as "An essential step towards full membership."[123] This statement clearly prefigures the emergence of the Palestinian state and thus the non-static nature of the Palestinian representation at the

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[123] Press Release, Department of Public Information, United Nations News Coverage Service, New York,

UN. Importantly for this thesis it also demonstrates one of the range of responses the international community may have towards a non-state entity. Furthermore it reaffirms the idea that the label attached to an entity (e.g.: "NLM" or "observer") does not necessarily have to define its capacity to act on the international stage. By taking an *ad hoc* and discretionary approach to personality the international community is able to vary the capacity of a entity to participate if it wishes.

The rights and privileges accorded to Palestine in this resolution have already been put to use. On 28 September 1998 Yasser Arafat made his first address in the General Assembly general debate[124] This is quite a milestone for the participation of the Palestinian Delegation at the UN since participation by the proclaimed President of the PA in General Debate would have been thought unbelievable less than ten years ago.

Also, the Palestinian delegation has been engaging itself in co-sponsoring drafts resolutions[125] and the observer for Palestine has also exercised his right of reply[126] as a result of the additional rights laid down in Resolution 250.

However, not all resolutions regarding the status of the Palestinian delegation at the UN have been successful. Only the year before Resolution 250 was adopted, a draft resolution was proposed which would have given Palestine similar rights to a member state, with the exception of voting and candidature rights. However, the proposals were rejected by 65 votes to 57, with 32 abstentions.[127] This demonstrates that although the Palestinian Representation has become a well-represented NLM, an insufficient proportion of the international community is willing to grant it rights and duties akin to that of a State.

The grant of observer status is also of utmost importance in relation to the diplomatic status of organisations. It provides firm ground on which an organisation such as the PLO may be able to build diplomatic ties since no other scenario can give as much

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53rd General Assembly, 18th Meeting (Plenary), GA9456, 28 September 1998.

[124] *Ibid.*

[125] See for example, *inter alia*, the co-sponsored General Assembly Resolutions L.49, 50 and 51 from the 73rd and 76th plenary meetings in the 53rd session of the General Assembly.

[126] Press Release, Department of Public Information, United Nations News Coverage Service, New York, 53rd General Assembly, 74th Meeting (Plenary), GA9520, 1 December 1998.

[127] *GAOR* 52nd Session, 68th plenary meeting, 9 December 1997, at 8 - 12. Draft General Assembly Resolution L.53/Rev.1 (LII) and the amendment contained in document A/52/L.59.

access to other actors on the international stage. Furthermore, the access those actors also have to information regarding the Palestinian question is automatically heightened. In this respect the UN is certainly the Palestinian's most valuable forum for debate and publicity.[128]

2.2: Recognition of the Palestinian Representation by States

Different states may each recognise the Palestinian Representation as falling at various points on the scale of possibilities for status. This section aims to examine some of the occasions on which individual states have recognised the Palestinian Representation and at what level. This will enable a conclusion about exactly how variable the status of the Palestinian Representation is to emerge. It is possible that due to the political facets of the recognition process it may be that the widest range of recognition of the Palestinian Representation is demonstrated by states than by any other type of international actor.

The political scenario in which the Palestinian Representation operates means that the context in which recognition is *de facto* or *de jure* accorded can mean that support or condemnation is given to the Palestinian Representation through the process of recognition or non-recognition. These issues can make it hard to establish the status of the Palestinian Representation. However this section will consider the occasions on which the Palestinian Representation has been classed as a NLM and as a government of a State since these are the two main levels of status which members of the international community have chosen to accord in this instance.

At the inception of the PLO in 1964 there was no real likelihood of achieving any similarity to a status of government as it was as a matter of fact much more akin to a guerrilla group. Since that time the relationship between representatives of the Palestinian people and the states of the world has changed dramatically.

It has been suggested that the PLO had been exercising governmental authority in many areas, such as war situations, extradition and taxation since as long ago as during the

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[128] See chapter 8, "The Mobilization of Support at the United Nations Level" in Kirisci, *The PLO and World Politics*.

1970s when it can be said that it was in its infancy, particularly regarding the authority which it is known to exercise today.[129] Proponents of such ideas provided strong facts and arguments as evidence of this, however it is argued that these alone do not amount to objective governmental status other than in the context it was accorded, particularly as it was in a politically sympathetic scenario.[130] They do nonetheless show that the PLO has been building upon its status over a period of time. It is clear at least that at that time it exercised power greater than that of other liberation movements and since then has gradually increased its status little by little. [131]

The fact that such claims were being made in the 1970s and that the face of the Palestinian Representation has changed significantly since then, particularly in the wake of the DOP in 1993, demonstrate the evolutionary nature of its status. Indeed, the Palestinian Representation's capacity to act and be recognised as a government has not remained static during the time it has existed.

Perhaps not surprisingly, due to the politicisation of the conflict in the Middle East where the Palestinian issue has always accompanied the problems associated with a non-Muslim state in the region, the Arab States led the way in recognition of the Palestinian Representation as a government,[132] whereas Western States have traditionally been less keen to make this step and consider it to be an NLM.[133]

2.2.1: Recognition after the 1988 Declaration of Statehood

On November 15 1988 the Palestinian National Council[134] took the step of declaring the State of Palestine.[135] This momentous event resulted in 95 states recognising the

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[129] Kassim, "The PLO's Claim to Status: A Juridical Analysis Under International Law", at 22 – 25.
[130] See for example the discussion regarding war situations, extradition and taxation authority in Kassim, *ibid.*
[131] See the conclusion to Part I of the thesis for a discussion of this issue.
[132] See, McLaurin "The PLO and the Arab Fertile Crescent", at 12.
[133] For example, it has been stated that the PLO is a "national liberation movement" and while "these relations, although they are regular and have reached the highest levels...retain a 'formal character, different from that of normal relations between States'" - from Re Arafat and Salah (1985) (1988) *It. YBIL* 295, also cited in Talmon, *Recognition of Governments in International Law*, at 150. It should be noted that this reference is over a decade old and prior to the DOP and thus the establishment of the PA.
[134] The Palestinian National Council considered itself to be a Parliament in Exile and is the highest legislative organ of the PLO. It has an Executive Committee which it appoints and it is the driving force

State of Palestine.[136] Since a government is generally an integral requirement of statehood, as discussed above, it can be argued that the states which recognised it also implicitly recognised a Palestinian Government in the shape of the Palestinian National Council, albeit arguably prematurely. [137]

It is instructive to break down those 95 states into smaller groups in order to examine in which areas of the political international community the Declaration received the most support. From this it will be possible to tell if the recognition granted was at least in part a political gesture.

Of the 95 states which recognised the State of Palestine 14 were Middle Eastern States.[138] This high number, given the size of the area, is not surprising because of the traditional Arab support for the Palestinian cause and a dislike of the Israeli agenda. Therefore these acts of recognition cannot be seen as impartial or even as necessarily stating that Palestine at that time fulfilled all the requirements of Statehood.[139]

A clear example of this is the Omani recognition of Palestine. On 12 December 1988 the Omani Foreign Ministry formally recognised the State of Palestine. Just over a month later on 17 December 1988, Sultan Quabus of Oman was interviewed by a Kuwaiti newspaper, (Al-Siyasa). He said that:

> "...the desire to establish the State of Palestine has been declared, but the state itself has not yet been established. Hence what has actually taken place was the decision to establish this state...The Palestinian brothers have explained to us the nature of recognition which has moral dimensions, so we immediately announced our recognition."[140]

Whilst recognition influenced by political or moral issues certainly existed at the time of the Declaration of Statehood as demonstrated by the above example, it should not automatically be assumed that all recognition was on a purely political platform.

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behind PLO activity.

[135] Palestine National Council, Declaration of Independence.

[136] See Appendix I which lists the 95 states and demonstrates the trend in recognition from Arab, African and non-aligned States. They are also listed in, "For the Record: The State of Palestine" (1989) V *Pal. YBIL* 290, at 291 – 293.

[137] See above, sections in 1.2 on "States without effective Governments" and "Governments without States"

[138] Bahrain, Democratic Yemen, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, United Arab Emirates, Yemen.

[139] See section 1.1 above for discussion on requirements of Statehood.

[140] Cited in Talmon, *Recognition of Governments in International Law*, at 41 – 42.

Indeed, some elements of Statehood may have been deemed to exist in sufficient form, particularly given that some Middle Eastern States have been treating Palestine as a full State for many years prior to the 1988 Declaration.[141]

African States were also keen to recognise the Palestinian State and of the 95 States, 42 were from the African continent.[142] African States, like Middle Eastern States have traditionally been supporters of the Palestinian cause. The fact that many African States had to struggle for self determination from colonialism during the last century no doubt influences their policy making and this is reflected in the number which recognised Palestine in 1988.

The remaining recognising States were made up of 23 Asian States,[143] 8 Eastern European,[144] 3 Russian,[145] 3 Western European[146] and 2 from South America.[147] This demonstrates the general political divides within the world in relation to the Palestinian situation very well.[148]

A majority of the 95 States recognised the State of Palestine by the end of November 1988.[149] Indeed of those 95 states which recognised the State of Palestine by the end of November 1988 many have full diplomatic relations with Palestine and a Palestinian Embassy exists within their State.[150]

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[141] See Chapter Two on the background to the Palestinian question regarding the existence of the State of Palestine in factual terms. With regard to the way in which Middle Eastern States have treated Palestine before the 1988 Declaration see discussion above regarding the PLO's governmental style authority and also Kassim, "The PLO's Claim to Status: A Juridical Analysis Under International Law", at 22 – 25.

[142] Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Congo, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Madagascar, Mali, Mauritania, Morocco, Mozambique, Namibia (SWAPO), Niger, Nigeria, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Tanzania, Tunisia, Uganda, United Republic of Tanzania, Zaire, Zambia, Zimbabwe.

[143] Afghanistan, Bangladesh, Bhutan, Brunei, China, Democratic Kampuchea, Democratic People's Republic of Korea, India, Indonesia, Korea (North), Laos People's Democratic Republic, Malaysia, Maldives, Mauritius, Mongolia, Nepal, Pakistan, People's Republic of Kampuchea, Philippines, Senegal, Seychelles, Sri Lanka, Togo, Turkey, Vietnam.

[144] Albania, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Yugoslavia.

[145] Byelorussian SSR, Ukrainian SSR, USSR.

[146] Austria, Cyprus & Malta –some of the States on the edge of Western Europe.

[147] Cuba, Nicaragua.

[148] See Chapter Two and the discussion on the political nature of international opinion on the Palestinian Question which occurs at the beginning of this chapter.

[149] 68 out of 95 States had recognised by the end of November. Of those 68, 25 were African, 19 were Asian, 6 were Eastern European, 11 were Middle Eastern, 3 were Russian, 2 were Western European and 2 were South American.

[150] 19 of the early African recognising States host a Palestinian Embassy as do 10 of the Asian States, 6 of

Even if the constitutive theory of recognition were held to be a good description of the law relating to the creation of states, which it suggested in Chapter One it is not, 95 states are not sufficient to satisfy the creation of a state through the constitutive method as this is nowhere near international consensus. However, it certainly is evidence of a significant proportion of the community's weight pushing towards this result.

Some of the remaining states of the world which were not in the 95 recognising ones did not make any move to either recognise or not recognise the declared state, whereas some states made a conscious choice not to recognise it. Israel and the United States of America being two obvious examples. Given the former's influence on the situation and the latter's influence on the international community in general, the effect of such opposition should not be underestimated.

- **International activity regarding Palestine beyond the 1988 Declaration**

Following its 1988 Declaration, the PLO decided to act in some respects as a State. It sent a communication to Switzerland,[151] stating that it was acceding to the 1949 and 1977 Geneva Conventions and Protocols.[152] Switzerland then sent a "Note of Information" to all the State parties which provided that,

> "Due to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled in an appropriate framework, the Swiss Government, in its capacity as depository...is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols...the unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on the 7 June 1982 by the Palestine Liberation Organisation remains valid."[153]

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the Eastern European States, all of the Middle Eastern States, 1 of the Russian States and 1 of the Western European States. It should also be noted that some of the early recognising States have a Diplomatic Mission rather than an Embassy – for example Austria. However, the African or Middle Eastern States which are traditionally very supportive of the Palestinian Cause tend to have an Embassy or nothing, suggesting perhaps that lack of an Embassy may be due to lack of Palestinian funds rather than lack of recognition. See section 2.2.3 for further discussion of the diplomatic relations of the Palestinian Representation.

[151] The depository State.

[152] See also the discussion regarding these Conventions and Protocols and their relevance to the Palestinian question in section 2.7.1 on Conferences below.

[153] Embassy of Switzerland, Note of Information sent to State Parties to the Convention and Protocol, 13 September 1989, cited in Crawford, "Israel (1948 – 1949) and Palestine (1998 – 1999): Two Studies in the Creation of States", at 116 – 117.

These reservations about the status of Palestine were also reflected in the deferment of both UNESCO[154] and the World Health Organisation (WHO)[155] on the issue of whether Palestine should be granted membership. The USA had threatened to withhold its payments to the WHO if Palestine were to be admitted as a full member – a clear example of American opposition to Palestinian Statehood in practice.[156] UNESCO did however resolve to allow Palestine the greatest opportunities to participate in the organisation's work, without actually going as far as granting the same rights as it would a member.

These examples of the failure of Palestinian attempts to be treated as a State demonstrate the fact that not all States responded to the 1988 Declaration positively. However the example of UNESCO shows that despite the anti-Palestinian lobby, efforts were made to ensure Palestinian participation. Therefore at a practical level, such opposition did not necessarily mean that Palestinian Representatives were unable to participate to a high degree in the life of the international community. This is indicative of the variability of personality which an entity may have at one organisation compared with another. The action of UNESCO also suggests that the international community is willing to be somewhat flexible in terms of Palestinian participation in practice if not formally though the granting of membership.

It is important to remember that the distinction must be made between political non-recognition and non-recognition on legal grounds.[157] It can be argued that political non-recognition, since it is discretionary, has very limited effects on the legal situation due to the fact that states can assume any political stance they wish at whim.[158] Non-recognition in legal terms may be refused as a result of non-fulfilment of one of the criteria of statehood. In the same vein, recognition may also be political in that it may be granted even if an entity has not truly fulfilled the necessary criteria. In a situation as politically sensitive as the Palestinian one it can be hard to differentiate between these types of non-recognition, as often political grounds can be disguised as legal grounds in

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[154] UNESCO 132 EX/31, 29 September 1989 – cited in Crawford, *ibid.*, at 116.
[155] WHO A42/VR/10, 12 May 1989 - cited in Crawford, *ibid.*, at 116.
[156] See Kirgis, "Admission of 'Palestine' as a member of a Specialised Agency and Withholding the Payment of Assessments in Response" (1990) 84 *AJIL* 218, regarding the legalities of the American threat to withhold payment of assessments to WHO if Palestine was granted membership.
[157] Crawford, *Creation of States*, at 121.

order to give them more weight in international relations and the facts of an individual scenario can be twisted to suit either party.[159]

To be sure, non-recognition and opposability does affect the relationship of any entity with the non-recognisers/opposers at a bilateral level. However, after the 1988 Declaration, since the tally of recognising states was 95 – evidence of a huge divide in world opinion as to Palestinian statehood - it can be argued that any recognition (or otherwise) mainly affected the factual position of the PLO as a government and/or its relations with individual states.

At an international level then Palestine had not objectively actually become a full State in international law as it did not possess all the necessary qualities of Statehood and even some of those States who recognised it as such did so with political motives. As a result of this the status of the PLO had not moved into the category of government in international law. In some international organisations and in some relations with individual states it was being treated as a government and this increased its objective status. However this can not be said to amount to a change in the overall category on the scale of possibilities within which it could be deemed to fall.

As far as the PLO was concerned the large support for its ultimate goal was an important political victory for the organisation.[160] Through the 1988 Declaration the status of the PLO had thus altered to a limited extent again. The 95 states had in effect stated that they at the very least considered that Palestine *should* become a full state in international law in the future or in some cases that it already had. However, other states, like Israel and the United States of America had made definite decisions to oppose such statehood.

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[158] *Ibid.*

[159] See Boyle, "Creating the State of Palestine" (1987/88) IV *Pal. YBIL* 15 and Crawford, "The Creation of the State of Palestine – Too Much Too Soon?" 1990 1 *EJIL* 310, as an example of how, even in strict legal analysis the given facts can produce extremely different results in law.

[160] Since the 1988 Declaration, many states have gone on to recognise the PLO at least as a legitimate representative of the Palestinians. Most significantly Israel and the PLO have signed letters of mutual recognition at the time of the signing of the DOP in 1993. The PLO have recognised Israel's right to exist in peace and security and Israel recognised the PLO as the representative of the Palestinian people – (Letters of mutual recognition were signed by each leader on 9 September 1993: *Declaration of Principles on Interim Self-Government Arrangements* (Jerusalem: Israel Information Centre) (1993)). In addition whilst there is no clear determination on the part of the Israeli government to Palestinian statehood there is a commitment to permanent settlement of the situation based on United Nations Security Council Resolutions 242 and 338. (Article 1, DOP)

The preceding examples demonstrate that different States responded in different ways to the 1988 Declaration, by either recognising, opposing or not responding. However, equally importantly, it is also clear that even amongst the 95 recognising States there were various intentions behind recognition. Indeed not all recognising States responded to the Declaration as quickly as others. Therefore, importantly for the theory asserted in Chapter One, the personality of the Palestinian Representation after the 1988 Declaration continued to be variable even amongst those which traditionally have supported Palestinian Statehood.

2.2.2: After the 1993 Declaration of Principles

The Declaration of Statehood was made about five years prior to the DOP and thus before the inception of the PA. If the PLO was thought of in some circles as a government before the DOP (despite some opposition) then it is vital to assess its current stature as its functions and status have changed considerably in recent times.[161]

Naturally, one of the important features of the functions of a government is to represent its people at an international level. In this respect the Palestinian delegation at the UN fulfils this task in a limited manner. When faced with a situation of occupation it is of primary importance for a people that their voice is heard in an international setting.

Admittedly, as discussed in Chapter Two, Israel still controls some aspects of the occupied territories' external relations as laid down in the DOP.[162] The Palestinian Representation is able to negotiate with overseas governments and international organisations on issues relating to economic development, aid, cultural, scientific and educational matters.[163] However, under the provisions of the DOP, it is not able to

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[161] As noted in the previous footnote the relationship between Israel and the Palestinian representation has changed dramatically as a result of the DOP. Notably since the assassination of Yitzhak Rabin (who played a leading role in the bringing about of the DOP for a brief but informative tribute to his work in the Middle East see Hausman, "Tribute to Yitzhak Rabin" (1996) 37(2) *HILJ* 521) in 1996 and the change of Israeli leader coupled with the disillusionment of the Palestinians with the slow moving peace process, Israeli/Palestinian political relations have deteriorated. Nonetheless, the DOP is a benchmark in the Palestinian situation and it would be politically very difficult for the Israelis to relinquish their recognition of the PLO and the PA as, at the very least , the Palestinian representative.

[162] See section 1.2.4 in Chapter Two.

[163] Gaza-Jericho Agreement, Article VI (2) (b).

conduct full foreign relations with other governments.[164]

As mentioned briefly above "...the responsibility of national liberation movements recognised by the United Nations is to express the views of the people in their respective territories.[165] It does not include conduct of their international relations beyond expressing these views."[166] This function is still left to the administering power and is therefore a tangible limit on the status of the movements concerned. Indeed, certainly legally, and potentially politically (depending on the situation at hand) the status and control of the administering power remains unaffected. It can then perhaps be questioned exactly what Wilson meant by the phrase, "It does not include conduct of their international relations beyond expressing these views." If, in its narrow sense, this means liberation movements are restricted to expressing the views of the people they represent regarding the issues surrounding their self determination then it can be argued that the current rights and privileges of the Palestine representatives at the UN exceed this definition. Suggesting firstly either that Wilson's interpretation is outdated and that the potential role for liberation movements has moved on since that time. Or secondly that the Palestine representation which grew out of the PLO can no longer be classed solely as a liberation movement since it has gone beyond the boundaries which up until recently have provided a guideline regarding the kinds of tasks a liberation movement would perform.

As to whether the DOP does lead to an independent government for the Palestinians is debatable since in many respects the emerging state of Palestine is still subject to Israeli control. [167] For example, the Palestinian economy and political structures are still subject to Israeli policy, the Palestinian police force's functions and conduct and the structure and elections of the PA itself are "seriously dependent on Israel".[168] Indeed it was reported recently that Israel owes the PA a large amount of money (up to half of its annual budget) and that this is affecting the PA's ability to perform its tasks.[169] Such financial dependence does not hark of independence.

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[164] Foreign relations is also an area in which Israel has retained competence under the DOP; Annex II, Article 3 (b).
[165] See section 2.1.1.
[166] Wilson, *International Law and the Use of Force by National Liberation Movements*, at 122.
[167] See, Rishmawi, "Features of the Administration of Justice Under Palestinian Rule" (1994) 53 *Rev. Int. Comm. Jur.* 25.
[168] *Ibid.*, at 26.
[169] BBC 1 O'clock News Report, 10 July 2001.

Therefore, the PA is not a fully autonomous government within the criteria specified in Section 1.2 since it does not exercise effective control throughout the territory it lays claims to.[170] However, arguably one of the reasons the Palestinian Representation has had a high level of success in terms of international recognition is because of the existence of the unfulfilled right to self determination of the Palestinians. It was submitted in Section 1.2 that the criteria of effectiveness can sometimes be lower if the emerging government is acting in a self determination situation.[171] Palestinian claims to statehood and the legitimacy of the PLO as Palestinian Representatives have been considered in Chapter Two, but are equally important here. This is the case since if it can be shown that the concept of a Palestinian state is viable in international law then there is no reason why lack of recognition of a Palestinian state should debar it from being considered to have a government.

It may be that the State of Palestine does exist in all elements save that of recognition,[172] and that the

> "...actual creation of the state of Palestine could develop a universal consensus among all states of the international community that the Palestinian people are entitled to implement their international legal right of self-determination in the Occupied Territories and that Israeli occupation forces must withdraw."[173]

However, this has been refuted and it has even been denied that the Palestinian situation is one of self determination, let alone one of Palestinian statehood,[174] because arguably the situation relates to the issue of a non-Muslim state in the region of the Middle

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[170] However arguably one of the reasons the Palestinian Representation has had a high level of success in terms of international recognition is because of the existence of the unfulfilled right to self determination of the Palestinians.

[171] Also in section 3.2 in Chapter One the importance of the quality of the claim to self determination was considered.

[172] Boyle, "Creating the State of Palestine".

[173] *Ibid.*, at 42 – 43.

[174] Crawford responds to Boyle's article, arguing that his claims are "weak and unconvincing" on the grounds *inter alia* of lack of "regard to some of the post-1945 developments" and a twisting of facts to fit within the criteria laid down in the Montevideo Convention rather than in relation to self determination as Halberstam suggests (Halberstam, "Nationalism and the Right to Self Determination: The Arab Israeli Conflict"*)*: Crawford, "The Creation of the State of Palestine - Too Much to Soon", at 313. See also Kirgis who does raise this as an issue in relation to Palestine seeking membership of the World Health Organisation (WHO) after its 1988 Declaration of Independence and the subsequent United States threat to withhold its assessed dues if the it was admitted. He claims that however the territory or population of "Palestine" is defined the population has never been under the control of the PLO. It can be submitted that the situation in Palestine is now different on both counts as a result of the 1993 DOP and the establishment of the PA, as opposed to at the time when Kirgis wrote the article - Kirgis, "Admission of 'Palestine' as a member of a specialised agency and withholding the payment of assessments in response.", at 220.

East.[175] Whilst this is a valid political consideration it is becoming less so as relations between Israel and other Arab States improve. Furthermore, such views would hardly propound the concept of the PLO or the PA as a government. It should be remembered, however that whilst the concept of Palestinian government may potentially be affected by lack of Palestinian statehood, the same is not true in reverse. Although generally effective government is a prerequisite for statehood if a state has been held to exist, changes of government or debates as to the control of the government in power over the territory and people, do not necessarily negate the existence of the state itself as a separate entity in international law.

With this in mind it is reasonable to submit that vis-a vis some states the PA is at the very bottom of the scale of governments within the illustrated scale of possibilities given at the start of this chapter. In relation to this it is interesting to consider what the 95 States which recognised the State of Palestine have done in the light of the DOP, since the mere existence of the DOP arguably reaffirms the fact that Palestine has not achieved full statehood in international law. As Crawford rightly states it is a misrepresentation of the situation "..to claim that one party already has that for which it is striving (if so, why strive?)."[176]

Such an analysis is not easy to achieve, given that States were not required to respond specifically to the DOP in the same way as they were if they wanted to respond positively to the 1988 Declaration. However, it is possible to draw some conclusions about this if the letters written to States, (which are reproduced and analysed in appendix III) are considered.[177]

- **Individual State responses to the question of the status of the PLO posed in a information gathering exercise.**

Fairly early on in conducting the research for this thesis a letter was written to each State which had an embassy in either London or Paris in order to establish what status

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[175] See for example, Halberstam, "Nationalism and the Right to Self Determination: The Arab Israeli Conflict".
[176] Crawford, "Israel (1948 – 1949) and Palestine (1998 – 1999): Two Studies in the Creation of States", at 122.

individual states considered the PLO to have, when they considered it had achieved this status and also whether in their opinion it was the legitimate representative of the Palestinian people.[178] There is a copy of the letter I wrote, a copy of each answer received and a more detailed analysis of the letters in Appendix III which should be referred to for further information.[179] However overall, it is interesting to note that 24 of the 56 replies to the letters were from States which had already recognised the State of Palestine in 1988.[180]

Some of the States wrote in their letters that they see the PLO as a government of an emerging State.[181] Zimbabwe stated that it was a government in exile and 3 others stated that Palestine was recognised as a State, from which it can be assumed that the Palestinian Representation is classed as its government.[182]

The majority of the other respondents to my letters which also recognised Palestine in 1988 stated that they considered the PLO to be either a national liberation movement or the sole legitimate representative of the Palestinian people.[183] This is obviously recognition which is substantially different to recognition as a government. However since the majority of these States have a Palestinian Embassy it is possible that in some respects the Palestinian Representation is treated in a similar way a government would be even if it is not formally recognised as such. [184]

These examples show that some States have clearly modified their responses to the Palestinian Representatives at a nominal level but not at a practical one. Therefore the DOP and the implicit admission that Palestine is not a fully fledged State did not change the relationship of the Palestinian Representation with individual States at a practical level or decreased in any way its international participation. It should also be

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[177] See Appendix III for discussion of the content and full responses to the letters.
[178] A copy of this letter is provided in Appendix III, as are copies of the replies received from States.
[179] It is particularly interesting to consider the analysis there which takes into account political state groupings and their responses to the Palestinian question as it builds upon some of the work in Chapter Two regarding politics and the part of this chapter regarding individual state's responses.
[180] Algeria, Austria, Bangladesh, Brunei, Burundi, Cambodia, Cyprus, Hungary, Indonesia, Korea, Lebanon, Madagascar, Maldives, Malta, Mauritius, Nepal, Philippines, Poland, Slovak Republic, Sudan, China, Tanzania, Ukraine, Zimbabwe.
[181] Algeria & Philippines.
[182] Cambodia, China, Mauritius.
[183] Bangladesh, Brunei, Burundi, Hungary, Indonesia, Korea, Madagascar, Maldives (recognised as "legitimate representative"), Malta, Slovak Republic, Sudan, Tanzania, Ukraine.
[184] See following section on diplomatic recognition for examples of States which have a Palestinian

mentioned that as some States recognised Palestine in 1988 in order to demonstrate a political stance on the issue and to offer moral support to the Palestinian cause that they may not have considered the PLO to be a full government at that stage. [185] Therefore the DOP does not necessarily require them to alter their perception of the precise status of the Palestinian Representation.

However, this does not fully answer the question as to whether the DOP leads to an independent Palestinian Government? A sustainable argument can be made that the DOP places the government of Israel and the PLO as the primary parties to the agreement as two equal subjects in international law. In support of this are the letters of explicit mutual recognition between Israel and the PLO and the fact that the Declaration recognises the right of the Palestinian people to "govern themselves".[186] Surely, "the consequence of recognising the Palestinian people and its right to govern itself in the West Bank and Gaza is recognition of the principle of the right of this people to establish a state in these areas if it so desires."[187]

However, whilst the DOP has created a greater element of equality between the two parties, on the international stage simple recognition by a neighbouring state cannot alter the status of an entire organisation so dramatically in international law. Although in the future, if the climate is right, it is very likely that the PA will become a fully fledged government of a full state, the DOP alone does not lead to such a conclusion as it gives no mention of Palestinian sovereignty over the West Bank or Gaza Strip.

Furthermore, at the time of the DOP the PLO were clearly the weaker side in the negotiations. The PLO may have been accepted by the Israeli government as an equal party for the purposes of negotiations at an operational level, however the text of the Declaration demonstrates that in reality this is far from the truth. The DOP refers to the Palestinian negotiators as the "PLO Team" whilst the Israelis are "the Government of the State of Israel".[188]

Embassy.

[185] See example of Oman in previous section.

[186] Article III (1), DOP cited in Benvenisti, "The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement" (1993) 4 *EJIL* 542, at 544.

[187] *Ibid.*

[188] DOP, Preamble. See also Falk's argument on this issue: Falk, "Some International Law Implications

It can be seen then that the Palestinian Representation has a good number of governmental style features, particularly when the combination of the PLO and the PA are taken together as the "government". However, it is not a full government in international law and is not sufficiently recognised as such, even by those States which had previously recognised the State of Palestine. Recognition post DOP therefore is variable depending on who or what is doing the recognising and can range from considering the Palestinian Representation as a full government in international law[189] to a national liberation movement which is a legitimate representative of the Palestinians.[190]

The key occurrence post DOP is not necessarily the change in attitudes of Palestinian supporters but in opposers. This is evidenced by the acceptance of Israel and the USA of the PLO presence at the negotiating table and the mutual Israeli/PLO recognition. It is clear that the DOP was a milestone for the Palestinian Representation's status in terms of vital bilateral relationships which have the influence to potentially further help change its status.

2.2.3: The Diplomatic Relations of the Palestinian Representation

The PLO and the PA have established a good diplomatic network outside the UN with individual states since their representation extends beyond international organisations, conferences and other fora. In 1975, only just after their acceptance at the UN, the PLO had 57 Information Offices. Not all of these offices had full diplomatic status, since some were in states which did not recognise the PLO, however they all assisted in increasing awareness of the Palestinian question.[191] They can be regionally categorised as being

"17 in the Middle East; 11 in Africa; 10 in Asia; 8 in Eastern Europe and the Soviet Union; 7 in Western Europe; and 4 in the Americas."[192]

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of the Oslo/Cairo Framework for the PLO/Israeli Peace Process" (1994/95) VIII *Pal. YBIL* 19, at 28.

[189] E.g.: Poland – see letter from Poland in Appendix III.

[190] E.g.: Maldives – see letter from the Maldives in Appendix III.

[191] Burke, *International Recognition of a Non-State Nation*, at 90 - 91. See also, Silverburg, "The PLO in the United Nations", at 369.

[192] Burke, *ibid.*, at 90. See also, Silverburg, *ibid.*

The level of Palestinian diplomatic representation has increased since that time. Whilst the political nature of some of the geographical areas given above have changed somewhat, the same regions will be used to demonstrate the changing nature of political acceptance of the PLO by individual states.[193]

There are currently[194] 15 in the Middle East[195]; 20 in Africa[196]; 12 in Asia (including Australasia)[197]; 11 in Eastern Europe and the Former Soviet Union[198]; 17 in Western Europe[199]; and 10 in the Americas.[200] There is clearly now much greater acceptance of the PLO by both Western European and American governments. This is surely indicative of the changing nature of the Palestinian representation in the occupied territories themselves and at an international level.

Indeed, most States which recognised the State of Palestine in 1988 after the Declaration of Independence have elevated the PLO office in their State to an Embassy. An clear example of this can be found in the action of the Soviet Union in 1990. Edvuard Shevardnadze, the Soviet Foreign Minister stated that the Soviet Union had "consented to let the PLO 'reorganise' its Mission in Moscow into the embassy of the State of Palestine in the Soviet Union."[201]

For a small, financially limited body like the PLO this is impressive and demonstrates both its enthusiasm for building diplomatic ties and its acceptance by the international community at a high level, thus positively impacting on its status.

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[193] For example, although the political make-up of Eastern Europe has changed and the Soviet Union has been dismantled the states which were part of this grouping will still be considered part of it for the purposes of this example.

[194] This information was provided by the Palestinian General Delegation in London (12 October 1998)

[195] All of which are embassies – Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia (Jeddah & Riyadh), Syria, United Arab Emirates, Yemen .

[196] All of which are embassies – Algeria, Congo, Ethiopia, Gabon, Ghana, Guinea, Guinea Bissau, Mali, Mauritania, Morocco, Mozambique, Nigeria, Senegal, South Africa, Sudan, Tanzania, Tunisia, Uganda, Zambia, Zimbabwe.

[197] 10 of which are embassies – Bangladesh, China, India, Indonesia, Korea, Malaysia, Pakistan, Sri Lanka, Vietnam, 1 is an embassy with a non-resident Ambassador – Philippines and 1 is a General Delegation - Australia.

[198] 9 of which are embassies – Albania, Bulgaria, Czech Republic, Hungary, Khazakstan, Poland, Russia, Turkey, Uzbekistan, Yugoslavia and 1 is a General Delegation – Romania.

[199] 2 of which are embassies, Cyprus, Greece; 14 are General Delegations – Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, UK; and 1 is a Diplomatic Mission - Austria.

[200] 3 of which are embassies – Cuba, Mexico, Nicaragua; 4 are General Delegations – Argentina, Brazil, Canada, Columbia; 1 is a Diplomatic Mission – Chile; and 2 are Information Offices – Peru, USA .

[201] *Washington Post* 11 January 1990 Sec. A., 28, cited in Talmon, *Recognition of Governments in International Law*, at 158, footnote 236.

In the past some States which do not consider that Palestine is entitled to full diplomatic status along with all the privileges and immunities it brings nevertheless allow it to benefit by letting Palestinian Representatives participate as members of diplomatic missions of third states. For example, in Italy, the Foreign Ministry stated that the PLO Office established in 1974 in Rome,

> "has not been recognised as having a diplomatic status in the strict sense but, in practice, it has been arranged in such a way that the directors of the office have been allowed to enjoy such status, allowing them to be accredited by one of the Arab embassies located in the capital among the members of its own staff."[202]

This demonstrates that in reality some states will give practical or *de facto* rights or privileges to an entity even though formal recognition would not normally be accorded. This means that States can enable the Palestinian Representation (or other non-state entities) to take an active role in the international community without prejudicing their own international relations policies. It also suggests that the assertions made in Chapter One regarding the fact that states do not necessarily consider themselves bound in practice to adhere by decisions as to formal recognition of an entity are correct. Reinforcing the assertions that the label attached to an entity can vary from the capacity in which it acts in practice in international life.

Overall however, it is clear that over the last 25 years the number of Palestinian Offices has increased throughout the world. There is therefore no doubt that the status of the Palestinian Representation has developed, however the fact that some States have an Information Office whilst others encourage an Embassy once again demonstrates the varied status which the Palestinian Representation is accorded throughout the international community.

2.3: Arab Recognition of the Palestinian Representation

The varying degrees of acceptance the Palestinian representation has received from different political groupings within the international community is evident when

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[202] Re Arafat and Salah (1985): (1988) 7*It. YBIL* 295, at 296 – 7 cited in Talmon, *ibid.*, at 158, footnote 237. This style of representation was used on many occasions by the provisional government set up by the

examples of recognition by sympathetic Arab groups are examined.[203] The PLO was recognised by all the Arab States (which included Jordan) as the sole legitimate representative of the Palestinians at the Rabat Summit Conference in 1974, not surprisingly, before any other large groups of states had taken this step. [204]

The Arab States have thus led the way in terms of recognition over the years. For example, the Palestinian delegation at the UN has been the chairman of the Arab Group of states at the UN[205] - a post which in most groups would be filled by a Member State.

After the Palestinian National Council's Declaration of the State of Palestine in 1988 the states of the Middle East were some of the first to extend formal recognition.[206] The vast majority did so within the first couple of days, which demonstrates the support which the Arab States have given at a political level for the existence of a Palestinian State. [207]

Palestine has been admitted as a full member of the League of Arab States which is evidence of a high level of status within the organisation and can be used as evidence of its status in international law.[208] When the Arab States recognised the PLO's representation of the Palestinian people in this manner it was accompanied by acceptance of certain powers of administration like diplomatic immunity, extradition, guarantees, loans, military agreements and taxation.[209] This style of acceptance of Palestinian statehood is certainly far from universal. However, it indicates that the status of the Palestinian Representation is not universally the same as a state due to its variability, in the sense that it is of a much higher level in relation to certain bodies or groups of states than others. However, given the political context in which such

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FLN in Algeria when States were not keen to damage their relationship with the colonial state – France.

[203] For examination of the political relationship between Arab States and the Palestinian Representation see the following books: chapter 5 "The Arab Governmental Level" from Kirisci, *The PLO and World Politics;* chapter 4 "The PLO and Arab State Relations" from Lähteenmäki, *The PLO and Its International Position*; chapter 5 "The PLO and the Arab States" from Nassar, *The PLO: From Armed Struggle to Declaration of Independence* and McLaurin "The PLO and the Arab Fertile Crescent".

[204] Burke, *International Recognition of a Non-State Nation*, at 73.

[205] S/1995/376 (A/50/176) - Letter of 8th May from Palestine as Chairman of Arab Group at the UN for May 1995 transmits Resolution 5487, "The Issue of Jerusalem", adopted by the Council of the League of Arab states at its extraordinary session, 6 May 1995.

[206] See Appendix II.

[207] With the exception of Iran who waited until 4 February 1989. See Appendix II for precise dates for each State.

[208] The Arab League Council accepted Palestine, as represented by the PLO, as a full member of the League with particular competence for questions concerning Palestine – 9th September 1976.

recognition is accorded, the implicit political angle to all recognition decisions regarding Palestine is underlined.

The Arab Fund for Economic and Social Development admitted the PLO as Palestinian representative to the Board of Governors as a full member in 1976.[210] Then later that same year the Board allowed the PLO to guarantee loans given in order to fund projects within the area of Palestine. This was made possible by virtue of Article 12 of the initial agreement which has set up the Fund. The interesting point to note is that Article 12 states that guarantees may be given by the "Government" of the state in question and that therefore the PLO was *de facto* recognised as the government of Palestine through this Decree.[211] The PLO, even at this stage, was enabled by the other Arab States to exercise "authority almost reminiscent to that of an established government."[212] When this is compared with the more far limited acceptance of the PLO within Western States (as discussed above) the variability of questions of status and the range of possible responses to claims of status is reaffirmed.

2.4: European Union Recognition of the Palestinian Representation

The PLO was first specifically mentioned by the major European leaders in June 1980. The nine European Economic Community (EEC - as it was then) Heads of Government gave a unanimous declaration which favoured the "recognition of the legitimate rights of the Palestinian people". [213] Furthermore they seemed keen to admit that the PLO would participate in the process of achieving those rights. Margaret Thatcher, the then British Prime Minister stated that the Venice Agreement, "accepts the PLO as one of the participants that must be involved in the talks."[214] Although, the PLO did not accept this limited recognition graciously, this does not change the fact that the Venice

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[209] See Salmon, "Declaration of the State of Palestine" (1989) V *Pal. YBIL* 48, at 69.
[210] Decree No. 4 1976: See Kassim, "The PLO's Claim to Status: A Juridical Analysis Under International Law", at 21.
[211] *Ibid.* It should also be noted that some academics state that *de facto* recognition should have almost as much influence as *de jure* since it is often very highly regarded in courts where recognition is an element of a case: Brownlie, "Recognition in Theory and Practice", at 207.
[212] Kassim, "The PLO's Claim to Status: A Juridical Analysis Under International Law", at 19.
[213] Venice Declaration, June 13 1980.
[214] cited in Friedlander, "The PLO and the Rule of Law: A Reply to Dr Anis Kassim" (1981) 10 *DenverJILP* 221, at 222.

Declaration endorsed a new line of European policy regarding the Palestinian situation.[215]

Ever since the time of the Venice Declaration the relationship between the European Union (EU) and the PLO and now the PA has continued to grow. The Commission of the EU stated that the "Goal of EU assistance to the Palestinian people of the West Bank and the Gaza Strip should be to support Palestinian political, institutional and economic empowerment."[216] The term "empowerment" is important in that it suggests that the EU wants to assist the Palestinians to help themselves and recognises their ability to do so through political, institutional and economic means. This is once again a good example of the changing nature of the Palestinian status and the international community's recognition of this fact. The responses of the international community thus are not limited by the variable nature of personality over a period of time.

The EC started to provide direct support to Palestinian institutions in the West Bank and Gaza in 1987 in order to facilitate this "empowerment" and after the first PLO- Israeli Interim Agreement of May 1994 which established the PA, much support has been channelled specifically towards the PA.

Such action certainly impliedly recognises the PLO and the PA as representatives of the Palestinians since it is an absurdity to suggest the a body can receive such assistance without actually existing. Nonetheless, the European Union has generally been fairly careful in the wording of statements and has thereby hedged the issue of the precise status of the Palestinian Representation. However, this equivocal nature is also evidence of a type of response on the scale of possibilities. It suggests that parts of the international community are willing to be flexible and allow Palestinian Representatives to act on the international stage without necessarily according them a specific degree of status. This in itself indicates that an entity's ability to participate in international life is as much (if not more) affected by *de facto* practice as *de jure* recognition.

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[215] *Ibid.*

[216] Communication from the Commission to Council and Parliament on Future European Union Economic Assistance to the West Bank and Gaza Strip" October 1995: Found at http://europa.eu.int/en/comm/dgib/en/cisjoren.htm

However even post-DOP the EU did not specifically recognise the Palestinian Representation as having full legitimacy since it pledged to assist in the Palestinian elections because "the democratic legitimacy of the PA is the central piece for Palestinian political empowerment."[217]

Significantly for the PA, the EU invited it to participate in the Euro-Mediterranean Ministerial Barcelona Conference of November 1995 as a full partner. The conference marked the launching of the Euro-Mediterranean Partnership which aims towards establishing a free-trade area. Participation as a full member in such conferences, particularly those organised by a respected and powerful predominantly Western European organisation is clearly a leap forward for the Palestinian representation, and both politically and in terms of its growing factual status. Indeed such the effects of such participation should not be underestimated.

As a result of the Barcelona Conference the Commission adopted a recommendation for Decision on 17 July 1996 which authorised the Commission to negotiate on the Community's behalf with the PLO (representing the PA).[218] The negotiations led to a Euro-Mediterranean Interim Association Agreement with the PLO on behalf of the PA which came into force on 1st July 1997.[219] The interim agreement which was concluded for an interim period of 5 years, pending a conclusion to the Euro-Mediterranean Association Agreement, includes a wide range of economic and commercial relations between the EU and the PA and defines the stages which will lead to the full liberalisation of trade between the EU and the Palestinian territories. Furthermore, the PLO and the EU also issued a joint statement, which was signed at the same time as the interim agreement, which sets up regular political dialogue between the two parties.[220]

This kind of activity is good evidence of the Palestinian Representation fulfilling the usual capacity within which a government would act in a particular sphere. This move on the part of the EU, despite not being explicit recognition of the Palestinian Representation as a government, is particularly important because it has occurred in a

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[217] *Ibid.*
[218] *EU Bulletin* 7/8 - 1996. Mediterranean and Middle East (13/17). Point 1.4.102.
[219] Euro-Mediterranean interim association agreement with the PLO, Document 297A0716 (01). *Official Journal of the EU* No. L 187, 16 July 1997, 3 - 135.

traditionally less politically sympathetic context and thus is a good indication that at least some of the legal criteria regarding a government's administrative effectiveness and capacity to enter into relations with other bodies have been fulfilled.

The Barcelona Conference and Euro-Mediterranean Association interim Agreement show that for the purposes of making trade and economic agreements the EU will treat Palestinian Representatives as a government and involve it in negotiating. This is particularly important given that the EU has recently reaffirmed "the continuing and unqualified Palestinian right to self determination..." but has for the first time stated that this should include "the option of a State" and that the Union "looks forward to the early fulfilment of this right."[221]

This statement suggests that although the EU has still not specifically stated what it recognises the Palestinian Representatives as, there is political support for the emergence of a state. This coupled with the practice of treating Palestinian Representatives as a government in spheres relevant to the EU and to any future government of Palestine could be interpreted to suggest that the EU considers there to be an emerging government within Palestine which requires a reasonable level of participation in international affairs which affect its interests.

At the Berlin Summit the EU went on to state that it is "..convinced that the creation of a democratic, viable and peaceful sovereign Palestinian State on the basis of existing agreements and through negotiations would be the best guarantee of Israel's security and Israel's acceptance as an equal partner in the region."[222] This support for the Palestinian cause from a traditionally less supportive, yet influential, region of the world was an important political victory for the cause for Palestinian statehood.[223]

The EU thus certainly considers the current Palestinian Representation as the legitimate representative of the Palestinians, but has not specifically stated at what level it

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[220] *EU Bulletin* 1/2-1997, point 1.3.98.
[221] "Statement on the Middle East Peace Process" European Union Summit, Berlin, 25 March 1999.
[222] *Ibid.*
[223] It is interesting to note that the EU has generally showed its willingness to support the PA, the PLO and the peace process in general through actions as well as words. In Summer 1997 the EU sent a Council and Commission delegation led by the President of the Council, Mr Jacques Poos to the Middle East to confirm the support for peace. The delegation met various Heads of State and Foreign Ministers from the region including representatives from the PA.

recognises the Palestinian Representation. However, the fact that it is willing to negotiate with the Palestinian Representatives in a sphere normally reserved for governments (economic and trading relations) and that it has stated its "readiness" to consider recognition of Palestinian statehood suggests that on the scale of possibilities the EU, at least in some areas, treats the Palestinian Representation as a government of an emerging state or a liberation movement able to participate at the highest levels. Furthermore, there does not appear to currently be any reason why the EU/Palestinian relationship should not be built upon in the future given the progressive way it has evolved in recent years.

2.5: The OAU and recognition of the Palestinian Representation

The Organisation for African Unity (OAU) is an international regional organisation which from time to time recognises liberation movements and has co-operated with the UN in this regard.[224] As a basic guideline, the OAU uses the criteria of effectiveness of the struggle of the movement in question but also looks particularly at the level of support which it has accrued in order to determine whether it deserves recognition by the organisation.[225]

The OAU has been an extremely influential body in terms of raising the profile of NLMs generally and has provided both financial and diplomatic assistance to many of the African groups in particular.[226] As discussed above, the effect that its recognition had on the process of the granting of observer status at the UN was crucial for many groups. Such recognition often marked the turning point for the internationalisation of liberation conflicts and on many occasions was a precursor to independence.

However, in such a politically emotive area as self determination and liberation it would be churlish to suggest that political and ideological factors do not also play a role. For example, in the mid-1970s there was a strong call for the Polisario movement in Western Sahara to be recognised by the OAU, however Morocco and Mauritania

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[224] See section 2.1 on United Nations Recognition above.
[225] *Ibid.*
[226] The OAU does not currently recognise any national liberation movements.

threatened to leave the organisation if this call was realised. At the expense of Polisario, their threats were heeded.[227]

The example given above is not intended to suggest that the OAU is any more susceptible to political considerations than any other regional organisation, it is merely provided to show that the recognition of NLMs does not occur in a vacuum and that the prevailing political climate can greatly influence their success.

Given the trends in the OAU to offer recognition to NLMs it is instructive to consider how it has responded to the Palestinian Representation. The regional organisation which covers the area in which the PLO and the PA operate is clearly the Arab League, however the OAU has also established a good relationship with the Palestinian representation and been sympathetic to the situation in the occupied territories.

The OAU has never extended formal recognition to the PLO or the PA, since it is OAU policy that declarations of recognition to states and governments should be carried out by "Member States in their individual capacities as a matter of national policy."[228] It can be seen from the list of States in Appendix II that many of the recognising States after the 1988 Palestinian Declaration of Statehood[229] were African members of the OAU, demonstrating African support for the newly declared state of Palestine.[230]

Yasser Arafat has, on a number of occasions, attended OAU Summit meetings as an invited guest. However this is only evidence of the strong relationship which has been developed between the two bodies, not of any recognition or status with the OAU itself. However, the Palestinian representation has never requested any form of observer status within the OAU so it is difficult to ascertain exactly how the OAU views its capacity to become an observer or member since no specific moves have been made by either body to clarify this.

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[227] Shaw, "The International Status of National Liberation Movements", at 23.
[228] Letter from Professor T. Maluwa, Legal Counsel and Head of Legal Division, OAU 24 November 1998.
[229] Palestinian National Council Declaration of Independence.
[230] See Appendix II.

Nonetheless, it is possible to examine resolutions adopted by the organisation in order to attempt to establish where on the scale of possibilities for status in international law the Palestinian representation may be considered to be by the OAU.

At the 62nd ordinary session in Addis Ababa (21 - 23 June 1995) the Council of Ministers of the OAU reaffirmed "the legitimacy of the struggle being waged by the Palestinian people under the leadership of the PLO, their sole legitimate representative..."[231] This is a clear statement as to the legitimacy of the PLO which suggests that it could, as a minimum be classed as the legitimate representative of the Palestinians or maybe a NLM (assuming other criteria, discussed above had also been fulfilled).[232] However, the resolution goes further than this. In paragraph 6 the resolution refers to the "PLO and its National Palestinian Authority and the interim Palestinian government" and to the "Palestinian national economy".[233] Such terminology is at least indicative of a pro-Palestinian statehood stance. The use of the word "national" suggests the existence of a state or at least support for the emergence of a state. Also the fact that the PA is referred to as an "interim government" indicates that the concept of a full government in time is not contrary to the stance of individual Member States.

It can thus be shown that the OAU, whilst having not made a specific determination on the status of the PLO and the PA is an extremely sympathetic forum for discussion of the Palestinian situation. Therefore, given the OAU support for African liberation movements and its support for the PLO and PA in its resolutions there is clearly strong evidence that the OAU objectively class the Palestinian Representation as falling at least within the category of NLM on the scale of possibilities. Indeed, if an international organisation can only express the views of the sum of its members then given the African States responses to Palestinian Statehood, the Palestinian Representation may even be classed higher on the scale – perhaps as a government.

However, given the OAU membership, which in section 2.2 were shown to be in favour of Palestinian statehood through their responses to the 1988 Declaration of Independence, overall support for the Palestinian cause is not surprising. Since OAU

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[231] CM/Res. 1590 (LXII). Resolution on the Question of Palestine, preambular para. 3.
[232] See section 1.3 above.
[233] CM/Res. 1590 (LXII). Resolution on the Question of Palestine, para. 6.

policy is to leave recognition decisions to individual member States, the actions of the OAU in expressing support for the Palestinian Representatives is at the highest level possible, without actually breaching this policy and formally granting recognition.

2.6: The Palestinian Representation and Other Groups and Bodies

It is also instructive to consider the other, less well-known examples of bodies where the Palestinian Representation is allowed to participate, or has been supported. This will add to the broad picture of the Palestinian Representation's participation in international life.

The large number and range of groups which support the Palestinian cause was ably demonstrated by the various statements at the 242nd Meeting of the United Nations Committee on the Inalienable Rights of the Palestinian People, on 30 November 1998, the annual observance of International Day of Solidarity with the Palestinian People.[234] Statements of support were read by representatives of the Committee on the Inalienable Rights of the Palestinian People, the General Assembly, the Deputy Secretary-General, the President of the Security Council, the Organisation of the Islamic Conference, the Movement of Non-aligned Countries, League of Arab States, the International Co-ordinating Committee of Non-Governmental Organisations on the Question of Palestine and the Chairman of the Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People.[235]

The Asian-African Legal Consultative Committee (AALCC) is an example of an inter-governmental body which has accorded the Palestinian Representation a high level of status in its organisation. Membership of the AALCC is only open to Governments in Asia or Africa. The AALCC Secretariat received a request from the State of Palestine for membership in December 1989, about a year after their Declaration of Independence in 1988. Since membership is accepted unless one third of Member States object, and in the case of Palestine only one member did object on the grounds that it did not

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[234] General Assembly Resolution 40B (XXXII), December 1977 called for the annual observance of this day of solidarity.

[235] Committee on Inalienable Rights of the Palestinian People, 242nd Meeting. GA/PAL/788, Press Release, Department of Public Information, News Coverage Service, New York, 30 November 1998.

recognise Palestine as a state, "Palestine was duly admitted as a participating state on 25th January 1990."[236]

The PLO is also a full member of the Group of 77, the Non-aligned Movement, the Group of Asian States at the UN, the Organisation of the Islamic Conference, the Economic and Social Commission for Western Asia.[237] As these groups also only admit States for membership, this is a good example of the Palestinian Representation being treated like a government of a State. This means that in all these spheres the Palestinian Representation would be classed in the category of "government" on the scale of possibilities for status. When compared with the lesser degrees of recognition by Western States or organisations it can be seen that the status of Palestine and its representatives is variable depending upon the context in which it is operating.

It should once again be remembered that on the whole the non-aligned States, the African States and the Islamic States[238] are politically supportive of the concept of a Palestinian State and thus much more politically inclined to make a gesture such as allowing full Palestinian participation in their organisation. Therefore this treatment cannot necessarily be seen as impartial. However, there is no doubt that it impacts on the role which the Palestinian Representation is able to play on the world stage. Indeed, even if the member States of the above organisations declared that they admitted the Palestinian Representation in order to make a political stance, it would still be that as a matter of fact the Palestinian Representatives were able to act in the manner of a government within those spheres and this could be taken as evidence of fulfilment of some of the criteria for status.

This kind of political support for Palestine is important from a legal point of view as it provides factual evidence of the way in which Palestinian Representatives have been received within the international community. The fact that many of the same States, (or at least States from the same political groupings), belong to the international

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[236] Information and quotation taken from a letter from Tang Chenyuan, Secretary General of the AALCC, dated 26 November 1998. It is not clear from his correspondence which State objected.
[237] Cited in the Final Declaration of the 11th Conference of the Heads of State or Government of the Movement of Non-aligned Countries, held at Cartagena, Columbia from 18 - 20 October 1995, para. 134.
[238] At a Conference of Foreign Ministers of the Islamic Countries held in Libya in March 1973 the delegates reaffirmed that the "PLO is the sole legitimate representative of the Palestinian People" and have continued to do so at later meetings see: "PLO Al-Kitab al-Sanawi al Filastini" (1974) *Palestine Yearbook 1974* (Beirut: PLO Research Centre) 58.

organisations and groups which have allowed Palestinian Representatives to participate as Representatives of a State and that those groups which have not allowed Palestine to participate as a State belong to different political groupings is important. It provides evidence of the varied responses to the Palestinian question at a political level throughout the international community.

This shows that the Palestinian Representation have a different level of status within different parts of the international community and adds weight to the theory from Chapter One that its personality can be variable.

This kind of activity which the Palestinian Representation has been part of also demonstrates the wide range of fora in which the Palestinian people are now being represented.[239] The international community seems to have adopted an inclusive approach to assisting the Palestinians by allowing their views to be shared with state groups such as the one mentioned above. This, whilst obviously helping the Palestinians in a practical way with support and aid, also impacts on representation issues. The more widely that Palestinian representatives are accepted and the more the "Palestinian voice" is heard, the more likely that representation will grow and become a norm rather than an exception. Representation, leading to acceptance then can impact on recognition. Although arguably this is a chicken/egg scenario, the point is perhaps that together representation at varying levels and in many different groups and recognition gradually enables the status of the Palestinian representation to evolve. Evolutionary status also being part of the theory that attainment of personality is a process in which the level of status may vary over a period of time.

Any activity at this level suggests that the PLO at a minimum may overall be classed as a legitimate representative group. However, given the practice of many international organisations to allow only groups which have achieved a very high level of status prior to achieving statehood to participate in their activities, it is suggested that from the evidence above, the PLO may objectively be classed as a NLM at the highest level or the PA may be considered, less objectively (by pro-Palestinian States), as a government.

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[239] The PLO is also an observer member of the following specialised agencies: ILO, UN Food & Agriculture Organisation, UNESCO, WHO, ICAO, Universal Postal Union, International Telecommunications Organisation, World Meteorological Organisation, Intergovernmental Marine Consultation Organisation, World Intellectual Property Organisation, International Fund for Agricultural

2.7: Conferences

The Palestinian Representation has also been able to participate in conferences in the international community. This is significant since they have been of a varying nature and participation has not only been on issues which affect Palestine directly but on a number of different aspects of international law and relations.

2.7.1: 1974 Conference on International Humanitarian Law

An example of the Palestinian Representation enjoying a high level of participation in international legal conferences is the 1974 Conference on Humanitarian Law which resulted in the 1977 Additional Protocols to the 1949 Geneva Conventions.[240] This had important ramifications for national liberation movements, including the PLO, both in terms of international humanitarian law and in status. The PLO attended the Diplomatic Conference in Geneva that led to the Protocols. It was one of 11 national liberation movements which took part and although there was some opposition to its participation, overall it was an important signal of the international community's willingness to allow it to play a part in debating issues which directly could affect the applicability of international humanitarian law to the occupied territories.[241] The PLO's participation was most certainly as a result of success at the United Nations, however its significance, at an extremely high level international forum should not be diminished.

Article 1(4) of Protocol 1 provides that "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self determination" may now come within the definition of "international armed conflicts" under Common Article 2 of the 1949 Conventions. This is clearly important for all NLMs since it confirms the internationalisation of their

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Development – see Appendix V of Kirisci, *The PLO and World Politics*.

[240] Protocols I & II Additional to the Geneva Conventions (Red Cross) relating to the Protection of Victims of International Armed Conflicts, 1125 *UNTS* 609. Chapter Five considers the issues raised by human rights, international humanitarian law and variable personality.

[241] Murray, "The Status of the ANC and SWAPO and International Humanitarian Law", at 408.

struggle and justifies at least a claim being made on the behalf of the people they represent.

However, particularly of importance to groups such as the PLO, Article 96(3) of Protocol 1 grants a kind of limited treaty making power through the fact that by making a "unilateral declaration addressed to the depository" a NLM may seek to bind themselves to the Geneva laws of war in relation to their conflict of liberation. However, the liberation movements only take on the duties under the protocols and cannot necessarily insist on the benefits.

Being party to the documents which conferences produced is even stronger evidence of such status. There was a lengthy debate about the inclusion of liberation movements in the conference and some concerns voiced in relation to the signing by the PLO of the 1977 Protocols to the 1949 Geneva Conventions.[242] However a compromise was reached whereby the participating NLMs signed a different page to sovereign states and it was noted that this would in no way affect the position of individual states in relation to them.[243] At the time this was clearly a leap forward for a NLM like the PLO. However, the distinction between the importance of multilateral recognition and bilateral recognition should be emphasised, since the status of the PLO vis-à-vis other signatories is not specifically affected. The fact that there were conflicting opinions as to how the PLO should sign the documents is once again further evidence of the range of responses the international community has to claims to participate by Palestinian representatives.

Moreover, as a result of the PLO's participation at the Additional Protocols Conference and at the World Population Conference in Bucharest and the World Food Conference in Rome in the same year as observer, the General Assembly invited the PLO to participate as an observer "in the sessions and the work of all international conferences convened under the auspices of the General Assembly" and "other organs".[244]

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[242] Opposition came mainly from Western States and Israel – see Lysaght, "The Attitude of Western Countries" from Cassese (Ed.), *The New Humanitarian Law of Armed Conflict* (Naples: Editoriale Scientifica) (1979) 354.

[243] Cmnd. 6927, 16. Cited in Shaw, "The International Status of National Liberation Movements.", at 27.

[244] See General Assembly Resolution 3237 (XXIX) and Freudenschuss, "Legal and Political Aspects of the Recognition of National Liberation Movements", at 118.

The Palestinian Representation continues to represent Palestinian interests at international legal conferences. More recently for example, it participated in the discussions relating to the setting up of the new International Tribunal on the Law of the Sea[245]

The fact that there was debate about whether the PLO could participate in the some of these conferences reinforces the fact that different states within the international community treat the Palestinian Representatives differently. Some are not willing to let participation occur without question, reminding the onlooker of the variable status it is deemed to possess throughout the international community.

2.7.2: Recent Conferences on the Palestinian Question

In 1998 there were a number of different conferences regarding the question of Palestine which were particularly poignant due to the 50 year anniversary of the creation of the State of Israel. In the majority of these there was Palestinian participation.

One of these conferences was The *Conference in Support of the Inalienable Rights of the Palestinian People*[246] which was attended by 102 Governments, 10 UN organs, agencies and bodies, 6 intergovernmental organisations, 47 non-governmental organisations and 3 special guests. Yasser Arafat, Chairman of the Executive Committee of the PLO and President of the Palestinian Authority also took part on behalf of the Palestinian people and addressed the plenary session of the conference. The participation of such large number of groups and States demonstrates the general level of support for resolution of the Palestinian question amongst the international community and to a limited extent an implied recognition of the Palestinian Right to self determination.

The PA has also been able to participate in Conferences at Ministerial level regarding financial assistance to Palestinians. In Paris on 9 January 1996 when the PA gathered with representatives of the donor community. The ministers there placed importance on

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[245] See Article 287 Law of the Sea Convention, Annex VI Special Arbitral Tribunal, UN Doc. A/Conf. 62/1122; (1982) 21 *ILM* 1261.

[246] Brussels, 24 - 25 February 1998: http://domino.un.org/UNISPAL.nsf/Symbol/Brussels98rpt1

the Core Investment Programme which had been unanimously adopted by the Palestinian Cabinet and significantly had been presented by the PA at a meeting of the Consultative Group of the World Bank on 18 October 1995.[247]

There have also been various non-governmental organisation conferences dealing with the Palestinian question. These have taken part in almost every corner of the globe.[248] At each Palestine has been represented by the Palestinian delegation at the UN by virtue of its status as a permanent observer and also by Dr Nasser Al-Kidwa (Permanent Observer of Palestine to the United Nations) by virtue of his role as a delegate of the Committee on the Exercise of the Inalienable Rights of the Palestinian People.

These conferences have been well attended by not only non-governmental organisations and UN bodies, but also many governments and inter-governmental organisations. Between them, these conferences attracted over 79 different governments and 6 intergovernmental organisations, including the EU, the OAU and the League of Arab States. Whilst by no means universal, such strong support for conferences must be good evidence of the wealth of feeling in the international community regarding the peaceful settlement of the Palestinian question and the role of the Palestinian Representation in this process, given that such a settlement is unlikely to occur without the creation of a Palestinian state in some form. The role of the PLO and the PA in the discussions leading to such a situation is vital. Importantly regarding status, the governments involved in these conferences do not make any opposition to the notion that the PLO and the PA are the legitimate representatives of the Palestinians. This type of activity strengthens the PLO's position as objectively fulfilling the criteria for a national liberation movement or a legitimate representative.

It is understandable that the Palestinian Representation is a participant in conferences on the Palestinian question and these examples in fact only reaffirm the Palestinian Representation's role of legitimate representative of the Palestinians. However, this

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[247] Ministerial Conference on Economic Assistance to the Palestinian People, Final Communiqué, paragraph 3. 9 January 1996.

[248] for example, The United Nations Latin American and Caribbean Seminar and NGO Symposium on the Question of Palestine, Santiago, Chilie 26 - 29 May 1998; The United Nations North American NGO Symposium on the Question of Palestine, New York, United States of America, 15 - 17 June 1998; United Nations International NGO Meeting on the Question of Palestine, Cairo, Egypt, 25 - 26 April 1998; United Nations European NGO Symposium on the Question of Palestine, Brussels, Belgium, 26 February 1998.

should not be underestimated as it is a solid foundation on which to build a claim to a higher degree of status. The most important examples of participation in conferences are those such as the international humanitarian law conferences or the tribunal on the law of the sea, mentioned above. Whilst the Palestinian Representation did not participate as a full member, it is interesting to see that the international community did not fail to include a Palestinian delegation simply on the ground that it was not representing a full state. The level of participation on the scale of possibilities was then not as great as being classed as a government, but surely indicates that the Palestinian Representation was considered to be a NLM which could be deemed to be operating at the highest levels possible for a body limited by its lack of Statehood.

It is interesting to further note that the occasions on which the Palestinian Representation is treated as a liberation movement with a high degree of status are those occasions when participation in the Conference (e.g.: international humanitarian law conferences[249]) or Organisation (e.g.: General Assembly of the United Nations[250]) are almost universal. Within those forums there exist both politically sympathetic and less politically sympathetic States. This sees the Palestinian Representation's status resigned to that of NLM, rather than to the higher level of government which it is granted in politically pro-Palestinian arenas – e.g.: the Arab League.[251]

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[249] See section 2.7.1 above.
[250] See section 2.7.2 above.
[251] See section 2.3 above.

CONCLUSIONS

The examples provided in this chapter demonstrate three main points. First, it gives examples of occasions on which the Palestinian Representation has been recognised and shows that a broad picture of the level of its participation in the international community can be seen. However, second and importantly for this overall thesis, the material gathered together and presented here suggests that the level of participation of the Palestinian Representation on the international stage is variable. That is, it is treated in different situations as a different style of entity falling at varying points on the scale of possibilities discussed at the beginning of this chapter. Third, and in relation to the issue of variability, the action of those recognising the Palestinian Representation has also been variable. Even if it has not been formally recognised, the members of the international community have not necessarily stopped it from participating in international life. Therefore, the actions of states in the process of recognition is not only 'all or nothing', as was asserted in Chapter One.

The many occasions on which the Palestinian Representation has been able to participate in activities at an international level suggest that personality is not an open and shut case where only states may participate or where the label officially accorded to an entity necessarily affects the role it can play. The non-state can therefore also play a role, which may fall short of full participation at all levels but is nonetheless significant. Furthermore, whilst account must be taken of action which occurs in a politically sympathetic environment all the given examples of Palestinian participation are evidence of a high degree of international legal personality, albeit not statehood.

The variable level of Palestinian status can be seen by comparing the treatment it has received at the hands of those politically supportive States and organisations (e.g.: the Arab League or the African or Middle Eastern States) and those less politically supportive States (e.g.: USA and Israel). Examples of the former's support for the Palestinian cause and inclusions of the Palestinian Representation in international life can be seen *inter alia* in their response to the 1988 Declaration of Statehood. The latter's behaviour is exemplified by the fact that they only recognised the Palestinian Representation as the legitimate representatives of the Palestinian people at all at the

time of the DOP and have consistently voted against increased Palestinian participation in the UN.[252]

The politically more supportive States have arguably not always been able to treat the Palestinian Representation in the manner their other behaviour indicates they would choose to. For example, in the UN the Palestinian Representation is not treated as a government due to the influence of other less supportive States. However, as shown, it does command a high degree of status which is largely as a result of the support it has received from a significant proportion of the world's States. Therefore, there are not inconsistencies in the way in which States behave towards the Palestinian Representation or the areas in which they allow it to participate. It is a fact of modern international relations that on each side compromises must be reached and therefore whilst this may suggest inconsistency, when voting patterns are analysed it can be seen that States are generally consistent in their overarching policies towards the Palestinian Representation.[253] The same is true of those politically less sympathetic States – there exists no inconsistency in their overall policies towards Palestinian participation. For example Israel's lack of recognition until the DOP is reflected in its voting patterns at the UN, despite the UN policy of including the Palestinian Representation in its activities.[254]

Thus the status of the Palestinian Representation depends upon who or what is recognising it at any one point in time. Although there were shifts in its objective status,[255] recognition or lack of recognition tended at the time of recognition to mainly affect its bilateral relations rather than its overall status as almost no recognition could be safely deemed to be without political undercurrents. If a sufficient number of States chose to support the Palestinian cause through recognition then this in turn could impact on its objective status within other bodies on a future occasion. For example, 95 States which recognised Palestine in 1988 clearly influenced the UN in the increasing of Palestinian participation.

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[252] See section 2.1.2 and 2.1.3 above.
[253] See section 2.1.2 above for analysis of voting patterns in the UN.
[254] See section 2.1.2 above for analysis of voting patterns in the UN.
[255] most notably in 1974 when it was granted observer status at the UN, after the 1988 Declaration, after the 1993 DOP or in the light of the 1998 General Assembly Resolution 250.

The examples of recognition or opposability given within this chapter demonstrate without any room for doubt that the Palestinian Representation falls at different points on the scale of possibilities – ranging from legitimate representative to government. Due to the political circumstances underpinning the existence of the Palestinian Representation, their status is surely a classic example of variable personality in the international community today. This is vital to this thesis since it suggests that the assertions made in Chapter One are borne out through the examination in detail of at least one strong example in the international community.

CONCLUSION TO PART I

It is submitted that the first half of this thesis has resulted in the achievement of three main conclusions. The first relates to international law in general, the second to the PLO and the third to non-state entities in the international community. Each shall be dealt with in turn.

(A): VARIABLE PERSONALITY

The first chapter of this thesis considered the issue of recognition and personality in international law. The assertions made there suggested that the existing theories regarding recognition and the achievement of status in international law did not necessarily correspond with recognition practice in the international community.

It has been discussed in Chapter Three how this theory is supported in the international community when examined in relation to a specific example, (that of Palestine), which was shown to basically be a complex web of bilateral relationships between the recogniser (or opposer) and the entity being recognised (or opposed). The will of the international community was therefore the driving force behind participation of the Palestinian Representation at an international level, particularly since the example chosen is a non-state entity making a claim to status. The theory that status is not an open and shut case and that entities other than states may have a meaningful degree of participation in international life is furthered.

Overall in terms of international law this suggests that law is not providing a coherent and comprehensive set of guidelines by which the international community is attempting to act. This is partly because international law seems to see the acquiring of status as an event rather than as a process which can have variances within it. Individual practice (which may vary from an entity's *de jure* position regarding recognition) and political will are overriding what had been considered to be the international norms which thus do not reflect the practice of states.

The theory is asserted that international legal personality is variable by nature both in terms of being non-static as an entity's relationships evolve but also and most

importantly, as between the entity and the different States or organisations which may or may not choose to recognise it. In other words, at any one point in time an entity may be a Government, a national liberation movement or political party, depending on with whom, when and where it is acting. Personality therefore is not 'all or nothing', there is a scale of possibilities within which an entity's status may fit.

(B): THE INTERNATIONAL LEGAL PERSONALITY OF THE PLO, THE PA AND PALESTINE IS VARIABLE.

It is submitted that the entities chosen for examination (the PLO, the PA and Palestine) have very variable levels of status in the international community. Examples of recognition by States and individual organisations were considered in Chapter Three and it appears that the personality of the case study is variable because it has evolved and changed over the period of time it has existed. Vitally, to support the theory explained in (A) above the PLO, PA and Palestine have been shown to participate in the international community at various different levels and are viewed as differing styles of entity due to the range of responses which the international community has had to them. Indeed it is submitted that this case study provides a classic example of variable personality from its inception to the present day. This for the reasons as explained in (A) is an important conclusion for the overall theme of this study.

(C): THE 'SUPER' NATIONAL LIBERATION MOVEMENT

Whilst it was not the aim of this thesis to consider the nature of national liberation movements in international law, it has transpired through this study that an additional conclusion to the two above can be drawn. The recognition which the PLO has received is far greater than that accorded to any liberation movement before it. This is demonstrated particularly well by the response of the United Nations and the increase in powers the PLO received in the late 1990s. When compared with the personalities of the liberation movements examined in Chapter One it seems that the PLO has achieved a much greater level of status than SWAPO, Fretilin, the PAIGC or the FLN. To be sure, these are not the only national liberation movements which could be used in

comparison, however it is argued that they represent some of the more successful groups in terms of the status they achieved whilst still liberation movements.

It is true to say that this phenomenon is partly as a result of the fact that there is arguably an inverse relationship between the time spent as a national liberation movement seeking Statehood on behalf of a people and the level of status accrued.[1] However, the example of the PLO demonstrates that a new breed of 'Super' non-state entity or liberation movement may be achievable in the international community. This affirms the potential for different types of actors on the international stage is still able to develop.

The conclusions drawn here are important as they deal with one of the primary issues in international law, that of personality. In Part II of this thesis the conclusions raised here about the nature of personality are put to the test by examining how the factual situation of entities with variable levels of status, such as the PLO, the PA and Palestine hold up in practice against other areas of international law.

[1] Furthermore, the PLO's strong claim to self determination and its renunciation of violence, both of which are discussed in Chapter Two are factors which have played significant roles in the level of status it has achieved.

INTRODUCTION TO PART II:

THE BROADER IMPLICATIONS OF VARIABLE PERSONALITY

In Part I of this thesis the theory that international legal personality may be variable has been examined. Variable personality is a descriptive theory which best explains some of the problems which were identified in Chapter One. However, international legal theories do not exist in a vacuum and every determination that an entity has a variable level of personality will affect all its interaction on the international stage, given that it is only able to interact by virtue of the level of personality it has achieved. Whilst this is somewhat of a chicken and egg debate, the central issue remains the same – the determination that an entity has a variable personality has broader implications for other areas of international law. It is some of these implications that Part II of this thesis aims to consider. The discussion which follows will also help to draw a conclusion as to whether the theory of variable personality is descriptively accurate.

The fact that an entity which has a changeable level of status may have ramifications for other areas of international law and therefore make an impact on other actors on the international stage is not in question. For example, recently the Committee Against Torture considered the case of Sadiq Shek Elmi.[1] Elmi was a Somali national from the Shikal clan and had applied for asylum in Australia because of a fear of torture or execution by the rival and majority Hawiye clan which was in effective control of parts of Somalia. Australia rejected his application and intended to expel him from the country and send him back to Somalia. In response Elmi alleged that his expulsion was a violation of Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Australia submitted *inter alia* that the case was not admissible on the grounds that the Convention was not applicable to the facts of the case. Australia stated that since the alleged threat of torture would be carried out by members of the Hiwaye clan that it did not fall within the definition of torture in Article 1 of the Convention because Article 1 requires that the torture be, "committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity".

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[1] *Communication no. 120/1998*: Australia. 25 May 1999. CAT/C/22/D/120/1998.

The Committee disagreed with Australia on this issue and found for Elmi. They stated that,

> "The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1".[2]

This stance taken by the Committee against Torture illustrates a willingness within the international community to recognise that the existence of entities with an unclear level of personality, which are also highly likely to be variable, can and do have consequences in other areas of international law.[3]

This is important as the range of possible areas affected by the determination of variable personality are immense. Part II therefore aims to consider some of these areas in more detail in order to gain a better understanding of how variable personality operates in practice in conjunction with other areas of international law.

Given the open-ended nature of such a task two specific areas have been chosen for discussion. First, Chapter Four looks at the question of responsibility in a situation of variable personality. This discussion is carried out on a general level in relation to some of the questions surrounding responsibility as traditionally applied to state entities. Second, Chapter Five then develops the question of responsibility by looking at the specific issue of variable personality and the responsibility for protection of human rights. This question being particularly pertinent given the kinds of situation in which variable personality may arise as an issue due to conflicting claims, also being those where human rights can easily be targeted for abuse.

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[2] Paragraph 6.5.

[3] It would be possible to critcise the decision of the Committee on the grounds that although their decision was a good one given the facts of the case, by recognising the power which the clan held in Somalia, their regime was validated to a degree because for every responsibility accorded to an entity there is a corresponding right. This is a fair point, however it can be counter claimed that the factual existence of such entities should not disadvantage other actors in the international community (in this case Elmi). It could also be argued that when this argument is run in relation to situations of variable personality such as the Palestinian example it is weak. This is because the position of the PA and the PLO are more structured and formalised than was the case in Somalia because of agreements such as the DOP and the

As in Part I these discussions are placed in a practical setting by considering them in the context of the Palestinian situation. Therefore, at times during the next two chapters variable personality is prevalent in the discussion and at others it is the Palestinian situation. It should be kept in mind that the Palestinian situation is the vehicle by which it is possible to discuss the problems raised by the theory of variable personality.

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international community's reactions and recognition. In this respect Palestine is an important area to study in relation to the implications of variable personality.

CHAPTER 4

VARIABLE PERSONALITY AND RESPONSIBILITY

INTRODUCTION

As discussed in the Introduction to Part II of this thesis, it is important to consider how the theory of variable personality may impact on other established areas of international law. As mentioned previously, a classic situation where an entity with variable personality would be likely to exist is one where there is conflict and competing claims to territory, particularly as this may result in differing political stances being taken as to sovereignty. A relevant issue to such situations is responsibility.[1] The question of responsibility is a natural topic in relation to which the implications of variable personality should be discussed as it is a well established idea that with a claim to status comes a corresponding duty when that right is fulfilled:

> "Since all legal relations, however numerous and complex, can be reduced to the relations of one man with another – of one individual with another – every such relation has two ends."[2]

It seems that the rationale behind extending responsibility in international law to non-state entities and those with variable personality is clear. Responsibility is simply 'the other side' of personality and should be considered in relation to any actor on the international stage.

It is with this in mind that responsibility has been chosen as one of the areas of law to be considered in relation to the theory of variable personality in order to assess how this description of the process of recognition impacts on the rest of international law.

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[1] Responsibility is generally referred to as 'State Responsibility' in international law since it has generally been states which have been considered to incur responsibility in certain circumstances and for certain actions. However, since this thesis considers the notion that there are entities other than states in the international community which may also have rights, privileges, obligations and duties which may differ from both entity to entity and also from situation to situation, the chapter refers to 'responsibility' thereby not prejudging the issue.

[2] From the forward by Arthur L. Corbin to, Cook (Ed.), *Hohfeld: Fundamental Legal Conceptions* (New Haven & London: Yale University Press) (1966).

However, there is very little international law writing on the issue of State responsibility which takes into account the rise in the number of non-State entities which are now actors at an international level and certainly none that considers the potentially variable nature of their personality.[3]

This is not surprising, however, given that current international law does not acknowledge that the theory of variable personality exists because states do not say that their practice is variable and results in variable levels of status. Variability is a description of what states do in practice, rather than what they purport to do. It is precisely because of this gap that the responsibility of non state entities with variable personality should be examined.

This gap between law and practice means that on the whole at a basic level there has been a failure to consider whether there is, or should be, a link between personality and responsibility because responsibility is generally thought of as 'state' responsibility where the level of status is fixed at statehood.

This chapter looks at the current law relating to responsibility, and questions whether it is compatible with variable personality and therefore whether overall it supports the theory that variable personality is a justifiable way of classifying recent state practice in the field of recognition. It may then be necessary to consider whether variable

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[3] Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon Press) (1967) does look at individuals as claimants but does not look at the issue of claims against non-state entities. Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford: Clarendon Press) (1983) provides a thorough and useful examination of many issues regarding responsibility from the premise that states are the entities against which potential claims arise. Eagleton, *Responsibility of States in International Law* (New York: New York University Press) (1928) as the title suggests, and like pre-war writing in general, the main actor on the international stage is assumed to be a state. Lillich (Ed.), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: University Press of Virginia) (1983) works from the premise that claims will be made against states and therefore does not consider the link between personality and responsibility. Randelzhofer & Tomuschat (Eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague/London/Boston: Martinus Nijhoff Publishers) (1999) despite being a fairly recent collection of contributions on the topic this book focuses on human rights abuses and claimants rather than on the range of entities against which claims could be brought. Spinedi & Simma (Eds.), *United Nations Codification of State Responsibility* (New York/London/Rome: Oceana Publications Inc.) (1987) does begin to include issues relating to the possibility of expanding the categories of those against which claims could be brought in the contribution by Atlam, "National Liberation Movements and International Responsibility" 35. For further references to works on State Responsibility in general see, Jennings & Watts (Eds.), *Oppenheim's International Law, Vol. I, Peace. Introduction and Part I* (London: Longman Publishing) (9th Edition: 1992), at 498 – 499.

personality and responsibility should or need to be compatible with one another and how this could be achieved.

To answer some of these questions it will be important to continue to look at the case study of Palestine which has been one of the themes of this thesis so far. The fact that Palestine has not achieved statehood in international law but is a classic example of variable personality in practice will facilitate the examination of some of the issues which arise regarding the responsibility of a non-state actor with variable status. [4]

In order to consider these fundamental issues this chapter can be split into three main sections. The first section provides an overview of the general international law of responsibility and then moves on to look at the work of the International Law Commission (ILC) on responsibility. This examination will enable conclusions to be drawn about the existence of a link between personality and responsibility, and if one exists, to consider its importance.

The second section considers the theory of responsibility in the context of non-state actors and looks not only at the work of the ILC, but also at notable issues which may arise where non-state actors with variable personality are potentially entities which could incur international responsibility. This will assist in establishing whether the ideas enunciated in Part I of this thesis are reflected in the area of non-state actor responsibility.

The third section deals with the practical side of these questions and examines them in the Palestinian context by looking at the possibilities of Israeli and Palestinian responsibility for internationally wrongful acts within the West Bank and Gaza Strip. This section enables the full implications of either ignoring, or working with, any links which have been shown to exist between personality and responsibility to be explored in a practical context. From this it will be possible to consider how compatible variable personality and responsibility are in practice as opposed to on paper.

[4] As discussed in Chapter Three.

1: RESPONSIBILITY IN INTERNATIONAL LAW

1.1: An Overview of Responsibility

"In international relations, as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility in various forms."[5]

The potential breadth and complexity of issues of responsibility – covering as it does many *"legal interest[s]"* and affecting all *"legal person[s]"* - makes it a difficult area of study. However the complexity is increased by the fact that the law of responsibility has not kept pace with other developments in international law.[6] As already discussed in the introduction, there has been an increase in the number of non-state actors on the international stage and there is also a dimension to personality which means that an entity may have a differing status depending on with whom or what it is interacting at any given time. With these developments in mind, this section aims to look at the basics of the law of responsibility in order to be able to place in context the questions regarding whether the theory of variable personality is supported by other areas of international law, such as responsibility.

The law of responsibility is governed chiefly by customary international law which in some cases has been examined and enunciated by relevant claims tribunals or the International Court of Justice. The most important study of the law of responsibility has been that of the ILC,[7] which in 1949 identified 'State Responsibility' as one of 14 topics which it considered to be ready for codification. This study now turns briefly to the work of the Commission in order to examine its contribution to the law of responsibility. The ILC's response to the issue of personality and responsibility and the way it has treated the issue of non-state actors and responsibility will be considered in sections 1.2 and 2 below.

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[5] Brownlie, *System of the Law of Nations*, at 1.

[6] The American Society of International Law has begun to consider this issue, although not only in relation to entities such as the Palestinian Representation but regarding corporations for example – "State Responsibility in a Multiactor World" (1998) 92 *Proc. ASIL* 291 – 312.

[7] The International Law Commission was established by virtue of General Assembly Resolution 174 (II), 21 November 1947. The Statute of the Commission is annexed to Resolution 174. For a detailed discussion of the work of the Commission see, Sinclair, *The International Law Commission* (Cambridge: Grotius Publications Ltd.) (1987). For an examination of the Commissions pre-1980 work see *The Work of the International Law Commission* (New York: United Nations) (3rd Ed.: 1980).

1.1.1: The Work of the International Law Commission

In 1953 the General Assembly requested that the ILC take on the task of codifying the law of state responsibility.[8] This work is done by producing a codification of the pre-existing rules of general international law on the topic of responsibility by drawing together the different sources of international law in the area and making them into a series of articles which enunciate the rules more clearly in one continuous piece of work. The initial examination undertaken was not wholly successful in terms of furthering the codification of international law and in establishing the areas which the ILC would examine.[9] The General Assembly was not keen to narrow the work of the ILC[10] and a sub-committee agreed unanimously to recommend that the Commission deal primarily with the general rules governing the international responsibility of states.[11]

As a result of these deliberations, in 1963 Mr. Ago was appointed as the new Special Rapporteur on state responsibility. He submitted his first report to the Commission in 1969 at its 21st session when the topic was finally agreed and discussions could begin properly.[12]

During the 25th session the Commission at last began the laborious task of drafting articles on State Responsibility, the first six of which were produced in that session.

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[8] For discussion regarding the set-up of the ILC see Briggs, *The International Law Commission* (New York: Cornell University Press) (1965).

[9] For example, Mr. F. V. García was appointed as a special rapporteur on the area in 1955 at the ILC's seventh session, however the 6 reports he submitted during his 7 years in the post had not been considered by the Commission. (The reports can be found (in chronological order) in, *YBILC* (1956) Vol. II 173; *YBILC* (1957) Vol. II 104; *YBILC* (1958) Vol. II 47; *YBILC* (1959) Vol. II 1; *YBILC* (1960) Vol. II 4; *YBILC* (1961) Vol. II 1.)
For general examination of the ILC and the development and codification of international law see, Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague: Martinus Nijhoff Publishers) (1977).

[10] Garcia's reports had advocated that the codification be confined at this stage to "responsibility for damage caused to the person or property of aliens" (See in particular his first two reports in *YBILC* (1956) Vol. II 173 and *YBILC* (1957) Vol. II 104.)

[11] See *YBILC* (1962) Vol. I 2 – 45 regarding the Commission's debate and *YBILC* (1962) Vol. I 188 – 189 regarding the issue in their report to the General Assembly. The report of the sub-committee can be found at *YBILC* (1963) Vol. II 227.

[12] For Ago's report and the Commission's report to the General Assembly see, *YBILC* (1969) Vol. II.

After seven more reports from Mr Ago,[13] the Commission looked specifically at those articles which dealt with issues relating to general principles of responsibility; the act of the state under international law; breaches of international obligation; the implications of states in the internationally wrongful acts of other states and also the circumstances which may be considered to preclude wrongfulness, including attenuating or aggravating circumstances.[14]

Then, in 1978 at the 30th session, the ILC gave the first three chapters of part I of the draft articles to Governments in order that their opinions be understood and taken into consideration. In 1980 the Commission's work on the first part of State Responsibility was completed and the final chapters (four and five) were handed to Governments for further written observations.[15] The same year the Draft articles were adopted by the Commission.[16]

1980 proved to be a busy year for the Commission on the topic of State Responsibility for it also began its work on the second part of the draft articles. Also, as a result of Mr. Ago's election to the bench of the International Court of Justice, the post of Special Rapporteur was taken over by Willem Riphagen, who presented a report on the second part of the draft articles regarding the content, forms and degrees of responsibility.[17]

The ILC continued to work on part II and produced articles 36 – 53. These included key sections relating to the obligations which fall on the wrongdoing state, particularly regarding reparation (draft articles 42 – 44), the limits of the injured state's right to engage in countermeasures against the offending state (draft articles 47 – 50) and also deals with the notion of international crimes (draft articles 51 – 53). Part III deals with issues of a more procedural nature by presenting the draft rules for the settlements of disputes regarding State Responsibility. Although Parts II and III are would by no

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[13] For Ago's Reports in chronological order see, *YBILC* (1970) 177; *YBILC* (1971) Vol. II (part 1) 199; *YBILC* (1972) Vol. II 71; *YBILC* (1976) Vol. II (part 1) 3; *YBILC* (1977) Vol. II (part 1) 3; *YBILC* (1978) Vol. II (part 1) 31; UN Doc. A/CN.4/318, 24 January 1979 (and Addenda 1 to 7).

[14] See Brownlie, *System of the Law of Nations*, in particular pages 13 - 18 for a more detailed discussion of the history of the ILC's discussions regarding the issues they intended to consider in their sessions on state responsibility, along with relevant extracts from the sessions and the reports to the General Assembly.

[15] *YBILC* (1980) Vol. II (part 2) 26 – 62.

[16] For a full draft of the adopted articles and an introductory note see (1998) 37 *ILM* 440.

[17] U.N. Doc. A/CN.4/344, 1 May 1981. For an exposition of some of Riphagen's views on State Responsibility see Riphagen, "State Responsibility: New Theories of Obligation in Interstate Relations" from MacDonald & Johnston, *The Structure and Process of International Law* (The Hague: Martinus Nijhoff Publishers) (1983), at 581.

means be classed as straight forward, their passage through the Commission was less time consuming than the extended period which was taken to produce Part I.

Riphagen attempted to see through the completion of Part II (and also Part III) during his time in office as Special Rapporteur. However, the task proved too large and cumbersome and was finally completed during the time of Mr. Arangio-Ruiz, who held the post between 1987 and 1996.[18]

The Draft Articles have not been without criticism from both governments and academics, often as a result of the abstract nature of some of the provisions in Part I,[19] and because of the alleged failure to remain in keeping with customary international law in the area.[20]

The current Special Rapporteur is Mr James Crawford. He has the job of assisting the Commission in their task of reviewing the articles again. This involves taking into account some of the new case law in the area of responsibility and integrating them into the structure of the Draft Articles.[21]

At the end of the 52nd session of the Commission in 2000 the Drafting Committee provisionally adopted a complete text of the substantive Draft Articles on a 2nd

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[18] In General Assembly Resolution 160 (LI), 16 December 1996, there is a request for states to provide comments on the Draft Articles.

[19] See comments in Sinclair, *The International Law Commission*, at 86. See also the symposium on State Responsibility in (1999) 10 *EJIL*. See also the attacks on the draft articles by Allott, "State Responsibility and the Unmaking of International Law" (1988) 29(1) *HILJ* 1, who states that, "They [the draft articles] seek to find universally coherent rules covering the whole of the international behaviour of states. But they are particularising in their substance. They are not self-interest universalised but rather self-interest multilateralised – and the interest in question is the interest of governments. They take international law in precisely the opposite direction from that which the survival and progress of international society now demands.", at 25.

[20] The United States Government submitted its comments on 30 October 1997 which were very detailed and expressed concern on the articles lack of conformity with current customary international law.

[21] See the symposium on State Responsibility in (1999) 10 *EJIL* on the revision of the Draft Articles. See particularly, Crawford, "Revising the Draft Articles on State Responsibility" (1999) 10 *EJIL* 435. Crawford states that, "It involves bringing into account the more recent case law of the International Court (e.g.: *Diplomatic and Consular Personnel, Nicaragua, ELSI, Phosphate Lands, Gabcikovo-Nagymaros),* relevant cases of the various tribunals (especially the Iran-United State Claims Tribunal and ICSID tribunals; more recently WTO panels and the Appellate Body) together with the jurisprudence of the human rights courts and committees…", at 436 – 437.
For discussion regarding the continuing role of the ILC and its aim of progressively developing international law see, Anderson, Boyle, Lowe and Wickremansinghe (Eds.), *The International Law Commission and the Future of International Law* (London: British Institute of International and Comparative Law) (1998).

Reading.[22] However the Commission's tasks in the field of responsibility are not yet finished.

At the time of writing, the ILC is currently at work in its 53rd session which is being held in Geneva from 23 April to 1 June and from 2 July to 10 August 2001.[23] Although it remains to be seen exactly what will be discussed by the Commission, in his 4th Report on State Responsibility, James Crawford stated that all that is left for main consideration is (a) dispute resolution and (b) the form of the draft articles.[24] Within which the substantive issues to be discussed are, "what constitutes injury and damage", "serious breaches of obligations to the international community as a whole" and "countermeasures". Therefore, whilst it is possible that other issues may be raised through such examinations, it seems highly likely that the issue of non-state groups and responsibility and the issue of whether there is a link between personality and responsibility will not be debated. Depending on what is discovered regarding the way in which the Commission has dealt with the question of personality and responsibility previously, this does hint at the idea in the light of the theory asserted in part I of this thesis, that the topics are ripe for reappraisal.

However, before the ILC's responses to the question of personality and also to the question of non-state entities are considered, let us first turn to the basic provisions of the Draft Articles in order to set this issue in context.

1.1.2: Basic Provisions of the Draft Articles

Article 1 of the International Law Commission's Draft Articles on State responsibility provides that,

"Every internationally wrongful act of a State entails the international responsibility of that State."[25]

Article 3 and 4 then go on to provide that,

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[22] A/CN.4/L.600
[23] In accordance with General Assembly Resolution 152 (LV), 12 December 2000.
[24] A/CN.4/517
[25] Parts 1 and 2 of the Draft Articles on State Responsibility have been provisionally adopted by the Drafting Committee of the International Law Commission: See UN Doc. A/CN.4/L.569, 4 August 1998.

"Article 3: There is an internationally wrongful act of a State when conduct consisting of an action or omission:
a) Is attributable to the State under international law: and
b) Constitutes a breach of an international obligation of the State.

Article 4: The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law."[26]

These articles outline the very basic principles of state responsibility[27] and are followed by more specific details about *inter alia* the categories of conduct attributable to states,[28] breaches of international obligations,[29] responsibility of states for the acts of another state,[30] and circumstances which may preclude the wrongful act.[31]

Articles 1 and 2 demonstrate that responsibility is attached to a state by virtue of its position as an international legal person. So the question of personality is raised through the Draft Articles themselves. The issue to be considered here is the way in which the ILC has dealt with personality in their deliberations on responsibility. This discussion is likely to lead on to further issues regarding the personality of entities against which claims of responsibility could be brought. However, initially the study must examine the response of the Commission purely to personality as this will surely affect it's response to any further questions which are raised.

1.2: Is there a Link Between Personality and Responsibility?

The ILC has always been very clear in its approach towards personality in the context of discussing responsibility.

"The existence of an insurrectional movement per se creates certain specific problems which cannot be ignored in a draft codification of the rules of international law governing State responsibility. But taking these problems into consideration certainly does not make it necessary, in the course of the present codification project, to spell out the requirements imposed by international law for a given movement to be classed as an "insurrectional movement", or to specify under what condition, at what time and in relation to whom such a movement can be regarded as endowed with international personality and what is

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[26] *Ibid.*
[27] Chapter 1 of the Draft Articles.
[28] Chapter 2 of the Draft Articles.
[29] Chapter 3 of the Draft Articles.
[30] Chapter 4 of the Draft Articles.
[31] Chapter 5 of the Draft Articles.

then the scope – which will in any event vary from one case to another and, in any one case, with the passage of time – of its international legal capacity. The consideration of all these questions – which, for that matter should be raised equally, mutatis mutandis, in relation to States and in relation to international organisations – does not fall within the topic of the present study but rather within other major branches of international law, namely those dealing with subjects of international law."[32]

The Commission clearly recognises that there is a direct link between personality and responsibility. However, they choose not to let personality play a major role in their decisions. The rationale behind their reasoning is clear, for personality is an entire area worthy of study on its own. However, surely it is not, and indeed should not be as simple as to divorce the two without further examination.[33]

It should be noted that the Commission's opinion is stated on more than one occasion and it appears equally determined not to consider the issue of personality each time, other than to take the link between personality and responsibility as a given and in need of no further discussion in the context of responsibility. They seem to assume that the personality of an entity at any one point in time is clear and that it does not impact on the issue of responsibility. In their eyes an entity either has personality which would lead to the incurring of responsibility or it does not.[34]

"It was precisely in order to avoid prejudging such solutions that the Commission had preferred the formula 'in any case in which such attribution may be made under international law', to any of the other expressions suggested during discussion, such as 'possessing separate international personality', 'if it controls part of the State in question', or 'the international status of which is applicable to the relations in question'. The use of any of those expressions might have given the impression that the Commission intended to take a position on problems which, as already mentioned, are not relevant to the subject-matter of the present draft codification."[35]

In some parts of the discussion regarding whether the issue of personality should play a substantive role in the discussions about responsibility it is almost as if it was pushed aside because of its complexity:

"Like most of the members of the Commission he [Mr. Ramangasoavina] believed that it would be better not to raise the question of international personality; for an insurrectional movement could be recognised

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[32] *YBILC* 1975 Vol. II 92.

[33] It should be noted that courts have been willing to link personality with the notion of responsibility in terms of a non-state entity. For example, in Maclaine Watson & Co. Ltd v Department of Trade and Industry and Related Appeals and Maclaine Watson & Co Ltd v International Tin Council (1989) 3 *All ER* 523, the House of Lords held that, "...the ITC was invested with both a legal personality distinct from its members and the power to contract as principal, and therefore, applying the principle that no one was liable on a contract except the parties to it, the member states were not liable for the debts of the ITC because they were not parties to the ITC's contracts", at 524.

[34] Whether an entity is capable of incurring responsibility will be considered below in section 2 which discusses the Commission's response to non-state actors.

[35] Report of the Commission to the General Assembly, *YBILC* 1975 Vol. II 99.

by some States and not by others, and it was very hard to determine the proper criteria for granting it international personality."[36]

However, not all the Commission members were so keen to readily dismiss the question of personality. Mr Ustor was of the opinion that the Commission "...could not ignore that question"[37] and Mr Moreno stated that:

"It might be better to deal with the topic [personality] in a separate article, but it was far to important to be ignored."[38]

Mr Bedjaoui pointed out that "the question of how and why it possessed personality was not part of the subject under study; it belonged to another sphere." In purely practical terms Mr Bedjaoui is surely correct as the personality of an entity is a different question from that of responsibility. However, as shown above, the Commission noted that the two are inherently linked. It is submitted here that the history of the movement and any political motivations which have contributed to its personality are not strictly relevant. However these issues do contribute to the story of the level of an entity's personality, which if attempts are made to attribute responsibility to it, are important.[39]

The ILC does recognise that personality is a key factor when attempting to attribute responsibility to a newly formed state which grew out of a successful insurrectional movement;

"...the affirmation of the responsibility of the newly-formed State for any wrongful acts committed by the organs of the insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurrectional movement and that of the state to which it has given birth."[40]

The fact that the ILC noticed and placed some importance on the link between personality and responsibility is a very good start, even if they then chose to ignore it. However, in the light of the theory which has been asserted in Part I of this thesis regarding the nature of personality this approach does not go far enough. Therefore the remainder of this section sets out the reasons why there is a need of further

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[36] *YBILC* 1975 Vol. I 55. Other members of the ILC also acknowledge that the PLO has a "separate international personality" – see Mr. Elias, *YBILC* 1975 Vol. I 50. See section 3 below for consideration of the responsibility of the PLO and the PA.
[37] *YBILC* 1975 Vol. I 45.
[38] See comments of Mr. Moreno, *YBILC* 1975 Vol. I 53. It should be noted that Mr. Moreno generally took an inclusive approach to the topic of the subjects of international law, "He himself was among the few jurists who considered that any international body was a subject of international law.", *ibid.*, at 53.
[39] As will be seen below in section 2 when the issue of non-state entities and responsibility is considered specifically.

consideration of the personality issue, and an re-appraisal of some of the issues which the ILC was examining.

If the link between personality and responsibility is important it follows that unless the ILC has an extremely clear picture of the question of personality in international law, it must be unable to reach a satisfactory position regarding responsibility. This is because the question of an entity's personality must surely pre-date all other questions of international law, and must therefore have a bearing on every other question of international law. As a matter of logic, until the question of personality is settled and the subjects of international law are known, it is impossible to answer other international legal questions. Only with a clear picture of the workings of personality in international society is it possible to create an operative and effective system of international rules and progressively develop a coherent body law.

It is submitted that the ILC failed to recognise the true nature of international personality and that therefore their dismissal of importance of the link between personality and responsibility is flawed. The Commission does note that personality can change and evolve over a period of time:

> "Furthermore the insurrectional movement may vary in scope and importance as the struggle waxes and wanes. For example, the territory in which the movement exercises its authority may contract or expand, and the financial or other resources under its control may also fluctuate. All these considerations create a climate of uncertainty regarding the prospect of obtaining from that movement, in the course of the struggle, reparation for an internationally wrongful act."[41]

However, this conception of personality is linear and affected only by the ravages of time. As has been asserted in the first part of this thesis, the question of personality is in fact far more complicated. At any one point in time an entity's status may be variable. It's personality is a complex web of bilateral and multilateral relations which may vary from relationship to relationship.

As mentioned above, one of the members of the Commission, Mr Ustor, did try to look more closely at the issue of personality and go further than simply viewing it as determined by objective criteria:

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[40] *YBILC* 1972 Vol. II 131.
[41] Report of the Commission to the General Assembly, *YBILC* 1975 Vol. II 93.

"With regard to insurrectional movement, he was not sure that the capacity of such a movement could be determined solely by objective criteria as in the past when an insurrectional movement has acquired international personality on reaching a certain size. It might be asked whether the capacity of an insurrectional movement did not now also depend on its recognition. Yet, in all the precedents cited and in the text proposed the Special Rapporteur had taken the relatively simple position based on the text of pure 'effectiveness'. In international relations however, when there was an internal conflict, the problem might arise of the international, not constitutional, legitimacy, either of the government or of the insurrectional movement itself. That problem had already arisen in the context of decolonisation and would continue to arise in cases of aggression. The very clear principles stated in article 12 would therefore need some modification – if only in drafting – if the Commission decided to take account of the question of international legitimacy. His own view was that it could not ignore that question."[42]

However, even this more realistic appreciation of the achievement of personality, which also took into account other relevant questions such as legitimacy, did not result in the description of personality as potentially variable at one single moment in time.[43] This linear conception of personality is in evidence throughout the Commission's deliberations. By extracting a section from one of the quotations used above it is possible to demonstrate this point further:

"But taking these problems into consideration certainly does not make it necessary, in the course of the present codification project, to spell out the requirements imposed by international law for a given movement to be classed as an "insurrectional movement", or to specify under what condition, at what time and in relation to whom such a movement can be regarded as endowed with international personality and what is then the scope – which will in any event vary from one case to another and, in any one case, with the passage of time – of its international legal capacity."[44]

In the light of firstly the ILC's lack of willingness to consider personality alongside responsibility, and secondly the linear conception of personality upon which this decision partly rests, it is surely time to re-appraise the question of the responsibility of such entities. This should be done by bearing in mind the issue of variable personality and allowing the topics of responsibility and personality to complement each other and therefore work together. The ILC's theory of responsibility and it's discussion of responsibility and non-state actors will be considered below in section 2. However it must be recognised that their treatment of the issue makes it difficult to find in their work support for the theory of variable personality when it does not acknowledge its possible existence.

Earlier on in this section it was demonstrated that the ILC considered personality to be a complex area which should therefore not be examined at the same time as responsibility

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[42] *YBILC* 1975 Vol. I 45.
[43] As was discussed in Chapter Three legitimacy is a vital question when considering the status of liberation movements and can result in different levels of personality because of the differing views of other parts of the international community on the legitimacy of the struggle.
[44] *YBILC* 1975 Vol. II 92.

but that the existence of personality should be taken as a given.[45] For precisely the reasons that the ILC fail to consider personality and *a fortiori* that they do not realise it is a more complex issue than they understood it to be, it should be re-considered alongside other areas of international law. It is only by the linking of areas of international law together that a cohesive body of international law may be formed in both the area of personality and responsibility. This is much needed if international law itself it to progress and a workable set of rules created which are not in conflict with each other. Moreover, the description of personality as variable is a reflection of the practice of States and organisations, whereas the draft articles are a merging of *lex lata* and *lex feranda*. Therefore it is surely the Draft Articles which should adapt to work alongside the existing practice within other fields of international law, rather than attempting to force States to give up all discretion regarding recognition through suggesting that personality may not be variable and therefore should not be so affected by bilateral relations.

In previous times States alone used to be the subjects of the law of nations[46], however as was considered in Chapters One and Three this position has now changed and entities such as organisations[47], liberation movements[48] or non-state territorial areas[49] are all considered to have the potential to possess some degree of international legal personality. Therefore, this study now turns to consider the question of the responsibility of non-state entities in the light of the variable nature of personality.

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[45] See comments of Mr. Ramasoavinga above, *YBILC* 1975 Vol. I 55

[46] Some modern international legal theorists have blamed early international legal theorists for structuring descriptions of international society around the concept of the nation state being at the centre of international life, and argued that this has had too great an influence on the creation of international norms. For example, see Allott's criticism of the works of de Vattel and Wolff in Allot, *Eunomia: A New Order for a New World* (New York: Oxford University Press) (2nd Ed.: 2001) and Allot, *International Law and International Revolution: Reconceiving the World* (Josephine Onoh Memorial Lecture: Hull University Press) (1989).

[47] For example the United Nations itself – see Reparation for Injuries Suffered in the Service of the United Nations (1949) *ICJ Rep.*174.

[48] Such as the PLO (see Chapter Three) or SWAPO (see Chapters One section 2.1.2).

[49] Such as Hong Kong for example.

2: RESPONSIBILITY AND NON-STATE ACTORS

As mentioned throughout this thesis the number of actors on the international stage has increased dramatically over the last century, indeed, it has been considered in Part I of this thesis that there are scenarios in which two groups may exist within an area of territory, each having a distinct personality, yet one having a variable level of status.

In many situations these two groups may be categorised as the State itself and a non-state entity which is attempting to gain some level of control over all or part of the territory within the State's boundaries. In the previous section the approach of the ILC towards the link between personality and responsibility was considered. Much of its consideration of this link resulted from the need to look at the issue of the responsibility of non-state actors. Overall, this chapter aims to examine responsibility in the context of variable Palestinian personality. Therefore, it is important to think about the question of non-state actors and their responsibility from a theoretical perspective so that in the next main section, these ideas can be examined in the context of the Palestinian situation.[50]

It is true to say that the international law relating to responsibility is making steps forward in terms of taking into account the fact that States may not be the only entities able to take responsibility for their unlawful actions. For example, an international organisation, as a bearer of rights may also incur responsibility for its unlawful actions.[51] Indeed, whilst the question of the responsibility of international organisations is not fully developed in international law, it is not a novel concept.[52] One of the practical issues which may arise in attempting to attribute responsibility to an organisation is the question surrounding in which arena such a claim may be brought. These are similar issues to those which may occur in relation to other non-state groups (which are discussed below). For some organisations, such as those which have their own judicial body, this is not such a problem.[53] In order to attempt to draw together and clarify the law relating to the responsibility of international organisations at their 52nd Session, after a feasibility study had been carried out, the ILC reported that it intends to consider this topic as part of their future programme of work.[54]

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[50] See section 3 for discussion of responsibility in the Palestinian context.
[51] French Republic v Commission of the European Communities C – 327/91, 9 August 1994.
[52] See Amador, "State Responsibility: Some New Problems" (1958) 94 *Hague Receuil* 410 and Eagleton, "International Organisations and the Law of Responsibility" (1950) 76 *Hague Receuil* 319.
[53] For example, the International Court of Justice or the Court of Justice of the European Communities.
[54] ILC Report, A/55/10, para. 729 of Chapter IX Re: Long Term Programme of Work.

However, organisations are not the only non-state entities which can incur international responsibility. This can be seen in the examples of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (see section 2.1 below) where individuals have been held responsible for their breaches of international humanitarian law and also in the creation of an International Criminal Court.[55]

In the context of truth and reconciliation commissions there has at times also been a culture which has involved the responsibility of individuals or non-state entities, such as NLMs. Since truth commission's are generally used to investigate situations of alleged mass human rights abuse they are returned to in section 4.2 of Chapter Five which deals with the issue of the protection of human rights. However, it is important to note that in that context a NLM has been found responsible for human rights abuses. The El Salvadoran Truth Commission found that the Farabundo Martí Liberation Front acquiesced in the assassination of civilian mayors and that the People's Revolutionary Army had committed a significant number of executions.[56]

However the examples of liberation movements being found responsible are few and far between. Also the developments in the Criminal Tribunals for Yugoslavia and Rwanda and relate specifically to individual responsibility. It is submitted that the true breadth of non-state actors on the international stage (such as the PLO or the PA) is not fully realised in the law of responsibility.

Despite this, the ILC has deliberated the question of the responsibility of non-state actors and produced a Draft Article on the topic. Draft Article 15 attempts to deal with the situation of non-state actors in the form of NLMs by considering a scenario where a NLM exists alongside a sovereign State. It provides that:

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[55] For more details see Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10(1) *EJIL* 144 and Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 *AJIL* 22. For general information regarding international criminal law see Paust, Bassiouini, Williams, Scharf, Gurulé, Zagaris (Eds), *International Criminal Law, Cases and Materials* (Carolina Academia Press: Durham) (1996).

[56] Crahan, "The Salvadoran Truth Commission in Comparative Perspective" from Cançado Trindade (Ed.), *The Modern World of Human Rights: Essays in Honour of Thomas Buergenthal* (San José: Inter-American Institute of Human Rights) (1996) 473. The reports of the South African Commission should also be noted as these investigated *inter alia* African National Congress activity: African National Congress: Report of the Commission of Enquiry into Complaints By Former African National Congress Prisoners and Detainees (1992) and Reports of the Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse Against ANC Prisoners and Detainees by ANC Members II (20 August 1993).

"1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a state of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 5 to 10."[57]

The ILC saw fit to distinguish between those insurrectional movements which were successful and those which were still in dispute with another entity resulting in the continuation of conflict.[58] Under Article 15 the conduct of an insurrectional movement which is successful is therefore attributed to the newly formed State, as an attribute of its international legal personality.[59]

Once an insurgent group becomes the new government of a State then its responsibility for acts carried out during the revolution, "would be only natural".[60] Therefore a newly formed government from a national liberation movement is responsible for the acts it committed and also those of the previous government by virtue of the fact that it is the government of a State which had previously existed. This reasoning and the principle of attribution of responsibility on achievement of Statehood appears to be sound. Indeed, there are advantages in waiting until a liberation movement is successful before claiming, as it is surely easier to claim from an establishment which has a certain level of financial security than from a potentially poor group with limited internal structure to deal with such claims.[61]

There are obviously many practical problems associated with attempting to bring a claim against a group before full statehood is achieved. One of the main issues being in what kind of forum such claims could be brought. There are some examples of cases involving representative groups in the national courts and it would be possible to set up

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[57] In its revising of the original articles, Article 14 has been dropped and new Article 15 incorporates the substance of old articles 14 and 15. See Crawford, "Revising the Draft Articles on State Responsibility".
[58] The International Law Commission did not distinguish between insurrectional movements and national liberation movements – see discussion in, Atlam, "National Liberation Movements and International Responsibility".
[59] See *YBILC* 1975 Vol. II 91 – 92, paragraphs 3- 6 and Ago (Special Rapporteur), 4th Report on State Responsibility, *YBILC* 1972 Vol. II 128 onwards, Doc. A/CN.4/264 and Add. 1.
[60] See *YBILC* 1975 Vol. II 101.
[61] Since it does seem to be mainly practical problems which stop an unsuccessful group being held responsible it is possible to further argue that in a culture which attempts to encourage responsibility to be taken that unsuccessful groups should incur responsibility for their unlawful actions. Indeed once

a claims tribunal with the agreement of the group if there were a sufficiently large number of claims to be brought. [62] This would however be a very unusual step. Nonetheless, despite these practical problems this does not alter the theoretical question of whether such claims should or could be made.

The theory that a successful group may be held responsible for its internationally wrongful acts is also supported in state practice. By way of example, the ILC notes that this approach has been almost uniformly followed in the case law of arbitration Commissions. In the decision concerning the *Bolivar Railway Company,* Umpire Plumley for the British Venezuelan Mixed Claims Commission states that,

"The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallising in the finally successful result".[63]

A similar approach was taken in the *Dix case* where it was stated that,

"The same liability attaches for encroachment upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other *de facto* government."[64]

This approach is typical of most state practice in the area and is of the kind taken by many arbitral tribunals. For example, in the French-Mexican Claims Commission of 1924 the President of the Commission stated that,

"...if the injuries originated...by revolutionaries before their final success, or if they were caused...by successful revolutionary forces, the responsibility of the State, in my opinion, cannot be denied."[65]

However, the responsibility accorded in these cases is not really as a result of attempting to widen the possible number of entities which could be held responsible

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personality has been achieved at whatever level then a corollary of that claim is the corresponding duty to take responsibility for unlawful actions.

[62] For example, the PLO and Fretilin: Democratic Republic of East Timor, FRETILIN and Others v State of the Netherlands 87 *ILR* 73; United States v The Palestine Liberation Organisations and Others 82 *ILR* 282

[63] IX *RIAA* 445, at 453. Similar lines of argument were taken in the following cases which *inter alia* the International Law Commission also refer to: Puerto Cabello and Valencia Railway Company Case IX *RIAA* 513; The Dix Case IX *RIAA* 120; French Company of Venezuelan Railroads Case X *RIAA* 285; Pinson Case V RIAA 353. The Iran-United States Claims Tribunal also noted the rule in Article 15 regarding responsibility of a successful movement, see Rankin and Iran (1987 – IV) 17 *Iran-US CTR* 135.

[64] United States-Venezuelan Mixed Claims Commission: The Dix Case, *ibid.*

[65] Pinson Case V *RIAA* 353. Also cited in *YBILC* (1975) Vol. II, at 102.

under international law and therefore accountable for their actions, or to promote a culture in which entities are encouraged to take responsibility. Indeed only successful groups are held responsible since:

> "Responsibility comes because it is the same nation. Nations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will."[66]

Since these examples of state practice occurred in the early part of the twentieth century international society has changed somewhat, and as mentioned before, the number of non-state entities which have a degree of international legal personality has increased. In the light of this and particularly because of the existence of actors with variable levels of status there is a flaw in the ILC's appraisal of the situation of the non-state entity and the limitation of the attribution of responsibility to successful groups. This is because the ILC does not give sufficient consideration to the variety of potential situations in which wrongful acts may occur. For example, it does not sit well with situations in which the NLM has a significant, yet variable level of international legal capacity but has not however been fully successful in achieving its aims of statehood. Particularly if the movement is a long standing actor on the international stage.

By only making successful groups responsible, international law could create a vacuum in the law of responsibility. The problem with the approach of the ILC, in not considering in further detail the moment at which the level of personality is sufficient to entail responsibility,[67] is that then there are occasions on which this could give rise to a vacuum where no one entity is responsible for the acts of insurgents.[68]

The variable personality theory can lengthen the time between the first moment of recognition to achievement of the aims of an insurrection movement due to the lack of need for international consensus on personality. This in turn potentially lengthens the time in which internationally wrongful acts could occur. Under the principles laid down by the ILC those wronged would be unable to seek redress until finally the movement is

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[66] Bolivar Railway Company Case IX *RIAA* 445, at 452.
[67] Other than on achievement of statehood.
[68] Draft Article 14 provides that acts of the organs of insurrectional movements within the territory of a State are not to be considered as acts of that State. It is possible that this is mainly a foreseeable problem in prolonged struggles for independence or prolonged belligerent occupation as otherwise claims could be made against the government or a new government as soon as the revolution is over as there would not be too much delay. This is obviously particularly relevant for this thesis as there is more potential for delay when the entity concerned has a variable personality.

recognised internationally as the legitimate government of a State, and in some cases, until a new State comes into being.

One way to plug this vacuum could be to change the moment when a revolutionary movement can become responsible by using the test of effective control, rather than simply waiting until it officially gains statehood.

2.1: The test of Effective Control

It is submitted that a more appropriate way to determine whether it should be possible to attribute responsibility to an insurrectional movement is to use the test of 'effective control.' The test to establish responsibility is whether the administrative authority has 'effective control' over the entity which committed the internationally wrongful act. This has been used before in relation to States, for example, in the *Nicaragua Case* by the International Court of Justice.[69] Here the Court did not find that the unlawful acts of the 'Contra' forces could be attributable to the United States government because:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[70]

In the *Namibia Case*[71] the International Court of Justice used a similar test to that of effective control which they simply called by a slightly different name. They referred to 'physical control' in relation to the attribution of responsibility. It seems that physical and effective control are both extremely similar in nature and are assessed on a *de facto* basis;

> "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[72]

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[69] Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits (1986) *ICJ Rep.* 14.
[70] *Ibid.*, at 65, cited in Jennings and Watts (Eds.), *Oppenheim's International Law*, at 541.
[71] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (1971) *ICJ Rep.* 16.
[72] *Ibid.*, at 54. See also Brownlie, *System of the Law of Nations*, at 180 – 181, for further discussion of the *Namibia Case* and responsibility.

This test has been further developed in the recent case law of both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY).[73]

In the case of Tadic, the ICTY Appeals Chamber rejected the effective control test of the Nicaragua Case when dealing with State control of military or paramilitary groups and adopted the test of "overall control" instead:

> "Control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character...The control required by international law may be deemed to exist when a State...has a role in organising, co-ordinating or planning the military actions of the military group..."[74]

In both cases referred to below (*Musema* and *Blaskic*), the criminal Tribunals were considering the slightly different issue of individual responsibility of superiors for those in their control. However the principles are possibly capable of being transferred to the similar issue of the overall responsibility of an entity for those who are fighting or acting on its behalf (as is the case when considering responsibility of NLMs which as yet are not fully successful).

In the *Musema* Case a civilian who wielded a significant amount of power within the local area was prosecuted under Article 6 (3) of the ICTR Statute which provides that accused persons can be held criminally responsible as a "superior" for the failures to act. The test used to establish whether Article 6 (3) is fulfilled was in effect one of effective control:

> "It is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measure to prevent the commission of the alleged crimes or to punish their perpetration. Therefore the superior's actual or formal power of control over his subordinates remains a determining factor in charging civilians with superior authority."[75]

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[73] Respectively officially entitled: International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 and The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. See Security Council Resolution 955 (1994) and Security Council Resolution 827 (1993) respectively.

[74] Prosecutor v Dusko Tadic, Case No. IT – 94 – 1 – A (15 July 1999), at paras. 124 – 125. This quotation is also reproduced in Prosecutor v Tihomir Blaskic, Case No. IT – 95 – 14 – T (3 March 2000), at para. 121.

[75] Prosecutor v Musema, Case No. ICTR – 96 – 13 – T (27 January 2000). Also cited in Aptel & Williamson, "Case Note: Prosecutor v Musema" (2000) 1(1) *Melbourne JIL* 131, at 135. It is interesting to note in relation to Musema that he was a civilian who exercised a degree of superiority over others as a result of his position within the society he lived in.

The ICTY has also used similar principles to find General Blaskic individually criminally responsible for the actions of those under his control. The Trial chamber stated that one of the elements needed to find a person guilty under Article 7 (3) of the ICTY Statute is that:

> "There must be a superior-subordinate relationship between the commander and the perpetrator. Not limited to individuals who are formally designated commander and possess *de jure* command, but also includes a person who possesses de facto command (effective control) over the perpetrators of the crime."[76]

As mentioned above it is possible to distinguish the example of a non-state actor potentially being held responsible with that of an individual. For that reason it could be argued that the refinements to the test of control provided in *Musema* and *Blaskic* should not be used in relation to an emerging state and that the essence of the test as laid down in the Nicaragua case should be applied. This is a valid point, however it is submitted that it is somewhat academic because the thrust of the test is the same. The central issue to note is that whether the test is called 'overall control' or 'effective control' and whichever elements are used to establish responsibility, a *de facto* approach is taken to determine responsibility, be it state or individual. Furthermore, the *de facto* approach has been consistently adopted throughout the cases laid out above over a significant period of time.

The use of a test of effective control has already been discussed in relation to the criteria for a government in international law.[77] However, this topic must be revisited in relation to responsibility. It is easy to understand why a test of effective control is used in relation to state responsibility, since if an entity has no control over the actions of another entity it would not seem right that it incurred responsibility for those actions, as

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[76] Prosecutor v Tihomir Blaskic, Case No. IT – 95 – 14 – T (3 March 2000), at para. 300 – 301. For further discussion regarding the laws relating to the responsibility of those in authority see, Bantekas, "The Contemporary Law of Superior Responsibility" (1999) 93 *AJIL* 573.

[77] See Chapter One and section 1.2 of Chapter Three. See also, Peterson, "Recognition of Governments Should not be Abolished", at 3; Roth, *Governmental Illegitimacy in International Law*, at 137 – 142.

it would in effect be acting simply as an insurer for all people or property within their territory.

One potential problem with the test of effective control lies in the fact that with some non-state entities it may be possible for them to be in possession of some degree of control, perhaps over part of the territory, but would not necessarily be classed as having full effective control.

However, this is overcome because the test of effective control is a *de facto* test and their actual responsibility over the specific act in question could be the decisive criteria for the attribution of responsibility. Since the theory of variable personality can also mean that the length of time it takes for an entity to finally achieve its goals can be lengthy, without the use of the *de facto* test for liberation movements which have not yet achieved statehood, there is the real possibility that a vacuum without responsibility could be created. The vacuum would mean that an entity or individual which/who wanted to bring a claim against the non-state group could be unable to do so until it achieved statehood – which when the example such as Palestine is considered, is an extremely long time.

In section 3 below the issues which have been raised so far will be applied to the Palestinian situation. When this is done, it may be possible to see the test of effective responsibility more clearly and also the implications that variable personality can have on the workings of responsibility in practice.

Remaining with the theories of attribution of responsibility to non-state entities, this study now turns to the question of what or whose acts may be possible to impute to such an entity. The next section aims to look at the imputability problems which could arise where there is a non-state entity, particularly in the light of its potentially variable personality.

2.2: Imputability

Under customary international law a State is not responsible for all acts of all entities or individuals within its jurisdiction. Acts must be attributable to a State through establishing proof of a principal-agency relationship.[78]

If an act is carried out on behalf of a State it would not be difficult to establish such a relationship. When the entity claimed against is a State, the relevant law on imputability of acts of organs of state, international organisations and agents is laid down by Draft Articles 5 – 13 on State Responsibility. However, in situations where there is an attempt to impute responsibility to a non-state entity the situation is less clear, and there is potentially greater scope for problems to arise in the establishment of the principal-agency relationship. Many of the problems could arise out of the fact that claims may well be made as a result of the struggle or insurgency itself. The question of whether the non-state group is responsible for the actions of all individuals of the population who rise up against the existing administrative or State power, or whether it is only responsible for the acts of its agents is most certainly an issue. This is so particularly as it could be argued that the actions of a group of individuals who are involved in an uprising are acting on behalf of an insurrectional movement, albeit not with specific authority.

In order to consider the different layers of responsibility which a non-state entity could incur, it is perhaps simplest to create a number of example situations and then examine how the relevant case law applies.

i) First, let us imagine the situation where for example, a UK citizen is in the territory of a State where a struggle is being waged between a non-state insurrectional movement and an existing State. The UK citizen is then caught up in the struggle and is injured by a bullet from the rifle of a member of the insurrectional movement itself who has been ordered by the movement command to storm a governmental building.

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[78] See for example, Caire Claim, France v Mexico, French – Mexican Claims Commission (1929) V *RIAA* 516. See also, Lillich and Magraw (Eds.), *The American Society of International Law: The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (New York: Transnational Publishers) (1997), at 126.

It is generally accepted that, "a State whose government is the expression of a successful insurrectional movement must be answerable for the acts committed by agents of that movement during the struggle".[79] Therefore in a situation where the organs or agents of a non-state entity, which has a variable but significant level of personality, inflict damage upon a UK citizen, it is possible that international responsibility could be attributed. The action would be attributed on the basis that the insurrectional movement group satisfied the *de facto* test of effective control and that the acts of its agents or organs were deemed to be acts of the movement.

The basic principle of attribution is laid down by the ILC in Draft Articles 5[80] and 6[81] and case law also supports the theory that a State is responsible for the actions of agents and organs of a successful insurrectional movement. In *Short v Iran*[82] it was held that the government is responsible for the acts imputable to the revolutionary movement which subsequently took over the running of the State, even if those acts occurred prior to its establishment.[83]

The situation could become more complicated if the question arises as to whether certain parts of the movement towards revolution which actually committed the act are in fact organs or agents of the insurrectional movement. This issue was also raised in

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[79] *YBILC* 1975 Vol. II 104.

[80] "For the purpose of the present articles, conduct of any State organ having status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question."

[81] "The conduct of an organ of the State shall be considered as an act of that State under international law whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or subordinate position in the organisation of the State."

[82] (1987- III) 16 *Iran-US CTR* 76.

[83] The case of Short v Iran comes from the case law of the Iran-US Claims Tribunal. It provides the most up-to-date comprehensive set of case law regarding responsibility during times of revolution. The claims tribunal was set up in 1981 in order to settle the many claims between the United States of America and Iran. These had arisen because of the revolution which occurred in Iran during the 1970s. The Shah who was in power before the revolution occurred had encouraged mass American investment in Iran and many civilian and military Americans had been sent to Iran in connection with these businesses and military activities. The progressive events of the revolution in Iran notably during 1978 – 9 meant that many Americans were forced to leave, their business interests were affected or they were personally injured. During the course of the revolution there was a great deal of anti-American feeling in the State and there were numerous strikes and demonstrations which were often accompanied with violence. The Americans saw the culmination of this anti-western feeling embodied in the seizure of the American Embassy in Tehran on 4 November 1979 by students and the later endorsement of this action by the Iranian leaders. The Shah was toppled and the Pahlevi monarchy was replaced with an Islamic Republic which actively discouraged American involvement in the State. For further discussion of the Iran-US Claims Tribunal see, Aldrich, *The Jurisprudence if the Iran-United States Claims Tribunal* (Oxford: Clarendon Press) (1996); Lillich and Magraw (Eds.), *The American Society of International Law: The Iran-United States Claims Tribunal*; Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran/US Claims Tribunal* (Dordrecht/Boston/London: Martinus Nijhoff Publishers) (1994).

the Iran-US Claims Tribunal in relation to the Revolutionary Guards who were revolutionaries loyal to the insurrectional movement and new government. However, they did not receive a permanent position within the structure of the Islamic government until after the new government was installed in office. Nonetheless, during the revolution and its immediate aftermath they were formed in organised groups and acted as local security forces which the Ayatollah Khomeini (of the new government) supported. The Tribunal stated on this issue that,

> "...since they [the revolutionary guards] were not recognised during the period relevant to this case, attributability of acts to the State is not limited to acts of organs formally recognised under internal law. Otherwise a state could avoid responsibility under international law merely by invoking its internal law...The Tribunal finds sufficient evidence in the record to establish a presumption that the revolutionary guards ...were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations in which the new government must have had knowledge and to which it did not specifically object."[84]

It can be seen then that a *de facto* approach is taken in deciding whether a person or group is an agent or organ of the State. It is submitted that whilst this is potentially problematic in terms of evidence for situations of claims against non-state insurrectional movements, in principle the question of what is imputable can be the same as in relation to states.

The employment of the test of effective control to establish potential responsibility of the insurrectional movement, coupled with the test of imputability of the act itself, means that the possible vacuum of responsibility is filled as effectively as if the claim was being made against a state. Moving on from this fairly straightforward example, a different scenario will now be considered in order to examine the further layers of imputability.

ii) In the second example the facts are the same as in the first, however the member of the insurrectional movement which fires the rifle is not involved in a specific group action. In firing the rifle an individual is acting beyond the extent of the authority s/he has as a result of a position.

In domestic law there is a long standing principle that *ultra vires* acts of public authorities are still subject to legal consequences for those affected by the action. In

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[84] Yeager v Iran (1987) 17 *Iran-US CTR* 92, at 102 – 4. For further discussion of the issue of the Revolutionary Guards see, Aldrich, *ibid.*, at 196 – 200.

international law the situation is not quite so clear. If the test of effective control was satisfied, as before, it seems logical that the test to establish whether the act is imputable to the insurrectional movement is the same as if the act were to be imputed to a state.

In the *Caire Claim*[85] it was held that responsibility is imputable to the State for *ultra vires* action if,

"...it is necessary that they should have acted, at least apparently, as authorised officials or organs, or that, in acting they should have used powers or measures appropriate to their official character..."[86]

The distinction between private acts of officials which are outside the scope of Draft Article 10 (see below) and of acts which are within the apparent scope of authority, and thus imputable to the state, is very difficult to draw and situations must therefore be treated on a case by case basis. This difficulty is demonstrated in *Youmans* case.[87] In this case responsibility was imputed to the state. However the Commission noted that,

"Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience to some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts."

The status of these cases as customary international law on the topic seems to be uncontroversial, indeed Draft Article 10 of the Draft Articles on State Responsibility by the ILC was attempt to codify these customary rules. It provides that:

"The conduct of an organ of a state, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the state under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."

The principle emerging from this article could be ambiguous. However the ILC did give an example of what kind of situations would not be covered by Draft Article 10:

"If a policeman off duty uses the weapon supplied to him by the state for the purposes of killing an alien of whom he is jealous, that is not sufficient, in the eyes of the Commission, to justify attributing such action to the State under international law."[88]

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[85] (1929) V *RIAA* 516. The Claim related to the fact that money had been demanded from Caire on pain of death by a senior ranking officer in the Mexican Conventionist forces. He then ordered that the shooting of Caire when he did not pay up.
[86] *Ibid.*, at 530. This passage is also cited by Brownlie, *Systems of the Law of Nations*, at 146.
[87] (1926) IV *RIAA* 110. In this case soldiers were meant to be protecting aliens from rioters, but instead participated in the violence which resulted in the death of the aliens.

The question of *ultra vires* action has been raised in a recent well-known case in the United Kingdom. In the *Pinochet* case the former Head of State of Chile was held accountable for acts of torture allegedly committed whilst he was in post. The series of cases regarding General Augusto Pinochet Duarte was complex and interesting for a number of different reasons both relevant to national and international law. [89] However, for the purposes of this examination it is important to note that when examining the issue of immunity from action, as a result of his status as Head of State, for alleged acts of torture and human rights abuse, the House of Lords considered what would fall outside the protection of sovereign immunity. The Law Lords ruled that under s 20 of the State Immunity Act (1978) a former Head of State enjoys immunity only for acts done in his or her official capacity. The alleged acts of torture were potentially international crimes against humanity and as such there could be no immunity under national law. *A fortiori* there could be no immunity after December 1988 when the International Convention Against Torture (1984) had been ratified by Chile (the place where the alleged acts had occurred), Spain (the State seeking extradition of Pinochet for those crimes) and the UK (where Pinochet was residing).[90]

The Pinochet case is distinguishable from the scenario (ii) considered in this chapter above because here the question of the responsibility of a non-state group is being considered, and in *Pinochet* it was individual responsibility. However it is instructive insofar as it demonstrates that courts are less willing to accord protection to individuals who commit human rights abuses, or other actions, which are clearly outside the remit of their authority.

Once again, whilst the questions surrounding *ultra vires* actions and their imputability are not easy to answer, there doesn't appear to be any reason why the same tests cannot be applied if such a claim were to be brought against a non-state entity.

iii) In the third scenario the situation is basically the same as the first, except the UK citizen is this time injured by a brick which is thrown by a citizen of the State in which the insurrection is occurring and who is a supporter of the revolution.

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[88] *YBILC* 1975 Vol. II 69.
[89] See Bianchi, "Immunity versus Human Rights: The Pinochet Case" (1999) 10(2) *EJIL* 1.
[90] R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (no. 3) (1999) 2 *WLR* 827.

In the *Case of United States Diplomatic and Consular Staff in Tehran,* which arose out of the seizure of the American Embassy in Tehran during the Revolution, questions of imputability regarding supporters of a insurrectional movement were raised. The Court clearly recalled the principle that the acts of supporters of a revolution (as opposed to its agents) could be attributed to the State.[91] In that case the United States submitted that statements of the Ayatollah had incited supporters to take anti-American action and that the State was therefore responsible. However, in that case the Court was not persuaded on the facts and stated that the statements in question were not sufficiently directly linked to the action and were too general in nature to impute responsibility.

This question was also considered in the Iran-US Claims Tribunal. In *Short v Iran* the Tribunal held that the acts of supporters of a revolution cannot be attributed to the government after the revolution is over and the new government takes power.[92] Partly due to problems finding sufficient evidence to attribute actions of insurgent's supporters to the State[93] and partly because of the application of the principle in *Short*, the Tribunal attributed very few instances of such action to the government.[94]

The Tribunal did however note that if an insurgent group is sufficiently vociferous and influences the population, perhaps through statements or calls to arms, then wrongful acts may be reasonably foreseeable. If so, the chain of causation may be proven sufficiently to incur at least some degree of responsibility;

> "Even if the act of pulling the trigger is not attributable to the State because the actor is a private citizen and not an "agent" of the movement, an insurgency movement nonetheless, through its own acts, such as statements, may be said to have encouraged and thereby caused, at least in part, the pulling of the trigger."[95]

It is hard to state categorically therefore exactly when the link between statements and actions of supporters would be strong enough to impute responsibility. However this is clearly a question of fact and would therefore be assessed on a case by case basis. Overall however, as with states, once effective control is assumed by the non-state

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[91] *Case of United States Diplomatic and Consular Staff in Tehran* (1980) 3 *ICJ Rep.* 29.
[92] Short v Iran (1987 – III) 16 *Iran – US CTR* 76, at para. 34.
[93] Arthur Young and Co. and Iran (1987 – IV)17 *Iran-US CTR* 245.
[94] See for example, William Pereira and Iran (1984 – I) 5 *Iran-US CTR* 198 and Computer Sciences and Iran (1986 – I) 10 *Iran-US CTR* 269.
[95] Lillich and Magraw (Eds.), *The American Society of International Law: The Iran-United States Claims Tribunal*, at 126.

entity, as a matter of policy the same principles of attribution could be applied as in cases of claims against states.

iv) In the fourth scenario the situation is the same as in the first. To re-cap, a UK citizen is in the territory of a State where a struggle is being waged between a non-state insurrectional movement and an existing State. The UK citizen is then caught up in the struggle and is injured by a bullet from the rifle of a member of the insurrectional movement itself who has been ordered by the movement command to storm a governmental building. The additional issue in this scenario is that the non-state insurrectional movement, which effectively controls the territory in which the insurrection is occurring, fails to provide adequate means of redress for injured aliens.

International law is clear on the issue of being able to seek redress for breaches of responsibility. Draft Article 22 provides that,

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

This is a more problematic question for insurrectional movements which are in effective control, since the test of effective control does not necessarily include the provision that full and good relationships with the existing judiciary have been established. Furthermore, if a new state is being set up it may take a while for the necessary mechanisms to be put in place before those seeking redress could achieve it. However, it is argued that this issue, whilst potentially problematic for insurrection movements which are in effective control of territory is no worse than the current situation in international law where those injured must wait until a movement is successful if they have any chance of bringing a successful claim. Therefore, there is no reason why similar principle cannot be applied to an entity with variable yet significant status.

Overall, it is interesting to note that the jurisprudence in this area tends to adopt a factual approach to dealing with imputability. This is complimentary to the variable personality theory which also deals primarily with the realities of recognition and status.

Together they assist each other by using similar tools of analysis which in the long term will help to provide a more cohesive, logical and therefore simpler way of dealing with international legal issues.

It appears that as long as the principles which have in general been used to establish State responsibility could also be used to determine whether non-state entities are responsible, in most circumstances no particular difficulties arise. Obviously, there are potential issues which could arise relating to the obtaining of evidence, or of clarity regarding exactly who or what carries out which functions in a movement which has recently gained effective control, as their systems are unlikely to be as established as the existing State's. However, since a *de facto* approach is taken there is no reason why these problems could not be overcome.

An approach, such as the one described above, which would allow for the incurring of responsibility by an insurrectional movement in effective control, certainly goes a long way towards filling the gap which is currently left in international law by the failing of correct interpretation of the link between personality and responsibility. Allowing insurrectional movements in effective control of territory to incur responsibility for their wrongful actions is better for those who have been subjected to an internationally wrongful act as they are able to seek redress and offered better protection. It is also better for international law in general as it provides a more cohesive and effective body of rules.

2.3: Conclusions thus far

It is submitted that the discussion so far has produced four main conclusions which in the following section can be applied to the Palestinian situation in order to examine the responsibility of non-state groups with variable personality in practice.

1) The importance of the link between variable personality and responsibility has been underdeveloped in studies of the both areas.
2) As a result, the responsibility of insurrectional movements has been largely ignored until a group becomes successful and takes on the governance of a state.
3) As a result of the combination of points 1 and 2 above, there is a gap in the law of responsibility. This is particularly the case if a group has a variable level of personality for an extended period of time due to the power struggle they are involved in remaining unresolved.
4) The *de facto* tests of control and imputability which are already applied in relation to states would appear in theory to be possible to also apply to non-state insurrection groups.

3: RESPONSIBILITY IN THE PALESTINIAN CONTEXT

In Part I of this thesis it was established that Palestine and its representatives have a variable personality but have not yet achieved statehood. Therefore, under the ILC's rules it cannot yet be attributed with responsibility for unlawful acts. However, as pointed out above, this means that in practice there is potentially a vacuum of responsibility created. The following two sections aim to consider how the ideas expressed in the chapter so far can be applied to the Palestinian situation in order to think about how responsibility and variable personality work, or could work in practice.

First, section 3.1 will give a few examples of different types of events which are the kind of issues where the question of responsibility arises in relation to the Palestinian situation. The examples provided are by no means intended to be a comprehensive list of instances where international responsibility could be raised as an issue, (for this task would be huge). Neither are they to be used to establish exactly who is responsible and for what in those individual circumstances, as without a detailed enquiry into the evidence surrounding each incident this would be inappropriate. However it is hoped that these brief examples will assist in contextualising the chapter and provide a picture to frame the discussion.

Second, section 3.2 will consider whether, in the light of the personality of Palestine and the representatives of the Palestinian people, Israel can be held to have some degree of responsibility for acts which occur inside the West Bank and Gaza Strip.

Third, section 3.3 will then move on to look at the potential for responsibility of the PLO and the PA. This involves examining their responsibility under the law as it stands. However this section will also investigate what it would mean for the PLO and the PA if the tests, which were suggested in section 2 to incur responsibility of non-state groups, were applied. This last section should help to explain why the proposed amendments to the law of responsibility of non-state actors are more appropriate when a situation of variable personality is encountered.

3.1: Examples of the kind of situations where questions of responsibility could be raised in the Palestinian context.

The examples given in this section are all real or reported occurrences which have been found in the press or books. Given the violent and difficult history of the area there are of course many instances which could have been chosen. Those which were picked however, are not all intended to be pure examples of when responsibility would definitely be incurred or, most importantly, a full catalogue of events. Their aim is to provide examples of the kind of situations which occur in Palestine and Israel and some would be unlikely to incur responsibility at a state or non-state entity level.

After these examples have been given, in order to place the discussion which takes place in section 3 in context, the study will move directly on to the question of Israeli and Palestinian responsibility so that the questions of responsibility which these examples illustrate can be borne in mind.

i) On 10 August 1999 a 23 year old Palestinian from a refugee camp near Bethlehem sped his car into a group of Israeli soldiers who were waiting to be picked up and returned to their base. 8 soldiers were injured before the young Palestinian male was shot dead. No organisation took responsibility for his conduct. However, some organisations within Palestine had been championing the notion of individual's carrying out "martyrdom operations" rather than group organised suicide bombings because they are more difficult for the PA and Israel to control.[96]

ii) The shooting of two Israeli settlers who were wounded in Hebron's old city in early August 1999. Hamas claimed responsibility for the attack.[97]

iii) On 1st January 1997 a lone Israeli gunman, who was an off-duty soldier, fired for over 10 seconds into a crowded Hebron street, wounding a number of Palestinian citizens.[98]

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[96] For report see Amayreh, "New Hamas Offensive?" 606 *MEI* 20 August 1999 6.
[97] *Ibid.*
[98] Reuters, "Ten seconds that shook the Middle East" *The Independent* 2 January 1997 10.

iv) On 25th September 1996 Israeli soldiers killed 5 Palestinians and wounded more than 300 during Palestinian protests in Ramallah in the West Bank.

v) In November 1998 Ayman Amasi was acquitted by an Israeli court of a theft and rape in the Arab village of Tira in Israel. Six months later on 15 May 1999 he was arrested for a second time by the Palestinian police force. He was beaten and tortured by them and suffered a brain haemorrhage during questioning. It is reported that, despite having been already tried for the same offence, following a telephone call to Yasser Arafat, authority was given for him to be "punished for his crime".[99]

vi) On 31st July 1997 two suicide bombers killed 15 and injured over 150 in attacks on an open air Israeli market in Jerusalem. It is not clear who carried out the attacks although there were suspicions that they may have been linked to Hamas.[100]

vii) In summer 1976 two Arabs and two West Germans hijacked a plane and separated the Jewish passengers from the other passengers (who were released). The plane was landed in Entebbe airport in Uganda. There were questions surrounding Palestinian involvement in the raid, however there were also issues regarding the use of force which Israel employed in order to rescue the remaining hostages when it stormed the plane. The hijackers and some Israeli and Ugandan soldiers were killed in the raid.[101]

viii) During late 2000 and early 2001 there were a number of attacks on Jewish settlers in the West Bank and also others inside Israeli territory. Palestinian sources acknowledge that Osama Jawabri had taken part in them and that he was a member of the Fateh organisation which is headed by Yasser Arafat. Jawabri was assassinated in a revenge attack through a bomb in a telephone box he was using, reportedly by the Israeli army.[102]

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[99] Amayreh, "Shambolic Justice" 601 *MEI* 4 June 1999 10.
[100] Nolen, "Tell me – am I dead or alive?" *The Independent* 31 July 1997 1.
[101] See the Security Council debates on the incident which are reprinted in (1976) 15 *ILM* 1224.
[102] Silver, "Palestinian killed by an Israeli booby trap" *The Independent* 25 June 2001 11

3.2: Israeli Responsibility?

It should be made clear at the outset of this section that the international responsibility of Israel for its own unlawful acts is not in question here. The issue is whether it is possible to impute to Israel internationally unlawful acts which occur within the territories of the West Bank and Gaza Strip, possibly including the actions of the PLO, PA and their organs or agents.

The responsibility of Israel is considered here because it could be suggested that in a situation like that in the West Bank and Gaza Strip, Israel, rather than Palestinian bodies are responsible for internationally wrongful acts committed there. Such an approach would be based on the principle that as Israel is the administrative power it must take responsibility for the territories under its control. The test to establish responsibility is whether the administrative authority has 'effective control' over the entity which committed the internationally wrongful act. Such a test was used in the *Nicaragua Case* by the International Court of Justice.[103] Here the Court did not find that the unlawful acts of the contra forces could be attributable to the United States government because:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[104]

Under this test it would be possible to argue that Israel is responsible for the actions of those it still has control over since the creation of the DOP (e.g.: the remaining Israeli soldiers carrying out tasks relating to security of Israelis within the West Bank and Gaza Strip). It would also be possible to impute responsibility to Israel for actions which are taken by those who work in areas of responsibility which have not been handed over to the PA through the DOP.[105]

It is suggested that such arguments would hold true whether the tests given the Nicaragua case or the modifications to it by the ICTY and ICTR were used.[106] This is because the question considered here is whether Israel or Palestine is responsible in

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[103] Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits (1986) *ICJ Rep.* 14.
[104] *Ibid.*, at 65, cited in Jennings and Watts (Eds.), *Oppenheim's International Law*, at 541.
[105] See Chapters Two and Three where these powers are discussed. See also further on this section for discussion regarding the power which Israel still holds in the West Bank and Gaza Strip.
[106] As discussed above in section 2.1.

general for potential acts committed inside the West Bank and Gaza Strip. The question is not whether a specific example of individual action can be imputed to either entity.

For the purposes of this section, the tests are sufficiently similar to not affect decisions about whether Israel or Palestine is responsible for acts committed inside the West Bank and Gaza Strip, as both tests deal with the realities of a situation. Indeed, it has already been suggested in section 2.1 that the differences between the two tests in situations of state responsibility are academic as the thrust of all the case law is the *de facto* approach to attributing responsibility. In the context of the West Bank and Gaza Strip it is known which powers are still exercised by Israel and which powers have been handed over to the PA (as it is laid down in the Agreements). Therefore the difference between the types of tests suggested in the *Nicaragua* case and the *Musema* case would not affect the outcome of the question raised here.[107] Any differences in tests would only be argued in relation to a specific case once it had been decided which was the entity generally in control of that function of government. The tests would then be examined in relation to whether the entity which controlled the relevant function (i.e.: Israel or Palestine) had a sufficiently formed principal/agency relationship to the action in question.

However, it is important to remember that one of the reasons why a *de facto* test was used in relation to responsibility is because if a State has no control over the actions of another entity, yet is held responsible for them, the State would be acting as insurer for all internationally unlawful circumstances. In the Palestinian situation it could be argued that potential Israeli responsibility is simply a consequence of her choosing not to recognise Palestine as a State and thereby admitting that the PLO and the PA are in effective control of all areas of government.

In the areas where Israel could be deemed to still be the effective administrative power it is possible that internationally unlawful actions of the PLO and the PA and its organs and agents could be attributable to Israel. Therefore the *de facto* test of effective control is a good one since it is flexible depending on the facts of the case being considered.

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[107] In other situations where the delineation of which powers are exercised by which entity (including the entity with variable personality) are not clearly laid down, the situation would be much more complicated and the slight differences in the *Nicaragua* and *Musema* tests might need to be examined. In general, given that the Palestinian situation is an unusual example of power sharing and that situations where an entity with variable personality exists are more likely to be less formally arranged, it is quite possible that such an investigation would be required.

The following part of the discussion moves on to consider the extent of the Israeli influence in the West Bank and Gaza Strip. It is therefore important, and very relevant for the application of the test of effective control in relation to both Israeli and Palestinian responsibility, however it is placed in this section simply because Israeli responsibility is the first to be considered.

Israel does appear to consider itself to still have a degree of influence during the interim period within the whole of the West Bank and Gaza Strip. This can be assumed from the text of the DOP itself which provides that the West Bank and Gaza Strip are "a single territorial unit"[108] even if authority for public life in some areas is passed to the PA. Furthermore one of the Israeli drafters of the DOP and Legal Adviser to the Israeli Foreign Affairs Ministry has stated that the DOP does not alter the status of the occupied territories:

> "During the interim period, the status of the Gaza Strip and Jericho area will be identical to that of the West Bank...[Their status] will continue to be that of areas subject to military government, with Israel remaining the source of authority therein."[109]

The Cairo Agreement which established the first phase of the implementation of the interim agreements laid down in the DOP also reinforce this Israeli position.[110] Article V 3 (b) asserts that,

> "Israel shall exercise its authority through its military government, which, for that end, shall continue to have the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law."

The reference to international law must in this situation relate to the law of occupation governed by the Geneva Conventions.[111] Therefore, under the international law of occupation it can be inferred that Israel would be considered to have effective power within the territories. If Israel were held to have effective powers within the territories it may be assumed that she would be internationally responsible for all internationally wrongful acts within the territories during the time of occupation. Therefore, it is

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[108] Article IV, DOP.
[109] Singer, "The Declaration of Principles on Interim Self Government Arrangements" (1994) 1 *Justice* (Published by the International Association of Jewish Lawyers and Jurists) 4, at 12 – 13, also cited in Benvenisti, "The Status of the Palestinian Authority" Chapter 3 from Cotran and Mallat (Eds.), *The Arab-Israeli Accords*, at 50.
[110] Cairo Agreement was signed in Cairo on 4 May 1994, for text see (1994) 33 *ILM* 622.
[111] See Chapter Five for discussion regarding the Geneva Conventions.

possible to submit that however much power is handed over to the PA, the Israeli government arguably still has ultimate responsibility under the traditional international law of occupation, whilst occupation at any level continues.[112]

This however, is a technical description of the law and does not necessarily paint a full picture of the realities of the situation in terms of the control which both Israel and the Palestinian Representatives have.[113] As has already been pointed out, the test of effective control is a *de facto* test, therefore the realities of the situation are what is important in terms of state responsibility.

Overall, the Cairo Agreement presents a difficult technical situation in terms of responsibility. It states that Israel maintains her responsibility in relation to settlements, military locations, Israelis and external security.[114] However, overall it still depicts Israel as the occupying power. As was discussed in Chapters Two and Three however, there are many areas of public life which have been handed over to the PA to control. In practical terms this means that in the areas handed back to the PA the effective controlling power is that of the PA rather than Israel. Although Israel still has a varying degree of influence in those areas, as a result of Israeli troop withdrawals it can also not really be said to occupy them in the traditional sense.[115] This is a novelty in the international laws of occupation, indeed the Geneva Conventions are not framed in a way to deal at all well with questions of responsibility in such a situation.[116]

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[112] See Benvenisti, "The Status of the Palestinian Authority", at 50 where he notes in footnote 11 that, "The law of occupation does not relieve an occupant from the duty to cater for the interests of the occupying population by the mere fact of signing an agreement to transfer power to local groups. Article 47 of the Fourth Geneva Convention of 1949 states: 'Inviolability of Rights: Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying power, nor by any annexation by the latter of the whole or part of the occupied territory'."
Having noted this it could be argued in the context of the Palestinian question that the DOP and the creation of the PA would in fact benefit the "protected persons" referred to in Article 47 since it is working towards the achievement of their right of self determination for if Article 47 is taken too literally it would not assist in the resolution of a situation of occupation.

[113] Looking at the realities of a situation is an important tool in international legal analysis, however it should also be noted that Benvenisti also adopts this approach in his article cited above.

[114] Article V 3.

[115] As discussed in section 2.1 above in relation to effective control.

[116] Benvenisti, "The Status of the Palestinian Authority" in footnote 50 notes that Article 6(3) of Geneva Convention IV states that an occupant is only relieved of its duties under the Convention one year after the close of military operations "to the extent that such Power exercises the functions of government in such territory". This cannot be said to apply directly to the current situation in Palestine for as is discussed above and as Benvenisti points out, Israel no longer occupies all of the disputed territories.

In the geographical areas where authority has been handed over to the PA it would seem to be unlikely that Israel would be willing to accept responsibility for actions which could be imputed to the PA or PLO, particularly if they are actions which come within the PA's competence. However, if Israel did try to assume responsibility as a political act of ultimate authority and reinforce the lack of Palestinian statehood it would be extremely unlikely to be accepted by the PA, since the PA's aims are to increase its international competence rather than diminish it.

The whole aim of the DOP and the Cairo agreement was to create an autonomous Palestinian institution which was beyond Israeli control. By suggesting that Israel can (or would want to) assume responsibility for its actions surely defeats its purpose.

The lack of effective control which Israel has regarding the civil life of the areas handed over to the PA is also reinforced when the international law relating to occupation is considered.[117]

> "The test for effective control is not the military strength of the foreign army which is situated outside the borders that surround the foreign area. What matters is the extent of that power's effective control of civilian life within the occupied area; their ability, in the words of Article 43 of the Hague Regulations, to 'restore and ensure public order and civil life.'"[118]

Given that authority for civil life has now been handed over to the PA within the Gaza Strip and parts of the West Bank, it is unlikely that Israel can be classed as an occupant in the usual sense under international law.[119] Therefore, applying the *de facto* test of effective control, Israel cannot be held responsible for actions of the PA within PA controlled areas for its status is a purely formal and somewhat contrived one. However, as discussed above, it could still be held responsible for actions which come within the functions it still has under the DOP.

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[117] The Law of occupation alongside variable personality and the status of the PA will be considered in Chapter Five.
[118] Benvenisti, "The Status of the Palestinian Authority", at 56 – 57.
[119] For example, under Article 43 of the Hague Regulations an occupant would be capable of "Restoring and ensuring public life" – however, Israel has clearly handed competence for many areas of public life over to the PA.

3.3: Palestinian Responsibility?

At the outset of this section it should be noted that the ILC did recognise that the PLO possessed international legal personality, despite the fact that it did not support the idea that non-state entities should incur responsibility prior to achieving statehood:

> "... in the case of national liberation movements such as the PLO and SWAPO which had been recognised by the United Nations and consequently had separate international personality..."[120]

However, as was demonstrated in Chapter Three the personality of the PLO has moved on significantly since the mid 1970s. Indeed, as has just been discussed, Israel does not have full effective control over the West Bank and Gaza Strip and therefore her responsibility for unlawful acts within those areas is limited. In the light of this, unless responsibility may be incurred by the PA and the PLO, a vacuum of responsibility exists, thereby demonstrating that unless such a gap is deemed acceptable, the international law of responsibility needs to be re-appraised to ensure its compatibility with variable personality.

In section 2 above, it was submitted that the test for responsibility of non-state entities should also be the test of effective control since this is a practical way of dealing with responsibility issues and personality. It was also suggested that despite the fact that imputability is a complex topic when applied to insurrectional movements, that the same rules should apply as would in cases of States.

This section therefore aims to demonstrate how these proposed amendments to the law of responsibility could be applied to the PA and the PLO, in order to fill the vacuum in responsibility which is created as a result of their variable, yet significant level of international legal personality.

In considering whether Palestine can incur responsibility (as a state would) under the proposed amendments the first question to pose is whether Palestine fulfils the test of effective control. As was discussed in Chapters Two and Three and above in the previous section there are many areas of public life within the parts of the West Bank and the Gaza Strip which have been handed over to the PA to control.

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[120] *YBILC* 1975 Vol. I 55. Other members of the ILC also acknowledge that the PLO has a "separate international personality" – see Mr. Elias, *YBILC* 1975 Vol. I 50.

Article VI paragraph 2 of the DOP provides that:

"...with the view to promoting economic development in the West Bank and Gaza Strip.." authority for "...education and culture, health, social welfare, direct taxation, and tourism" are handed over to the PA as well as the authority to "commence in building the Palestinian police force".[121]

Article VIII of the DOP further provides that the Police Force must be set in place – "In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip...". This wording demonstrates that issues of public order would be deemed to be within the control of the PA.

However, as has been mentioned above, Israel remains in control of the external relations of the territories. Article VIII of the DOP emphasises these limits in the competence of the PA and reaffirms its lack of statehood by stating that some of the rights which are generally attached to statehood (such as the use of force in certain situations) are to remain within Israeli competence:

"...Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order."

This does raise issues relating to the test of effective control since it seems that the PA and the PLO could not be deemed to have control over the life of those Israelis in settlements within the West Bank and Gaza Strip. However, it is submitted that this does not affect the PA's ability to control the areas which have been handed over to it, since settlement areas are generally not in PA controlled areas.

Overall, the PA was given powers in the three generally accepted main branches of government; legislative, executive and judicial.[122] Even though the PA does not possess all the powers which a full government of a state would have, the existence of these three elements means that it is likely to fulfil a test of effective control in relations to the municipal functions it has been accorded, since the necessary systems are in place to help to achieve control.

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[121] Article VI, para. 2, DOP.
[122] Article VII(2), DOP.

The international relations of the PLO and the PA have already been considered in previous chapters.[123] However, the fact that Israel still officially conducts the external international relations of the PA should be remembered.[124] It is submitted that this does not mean that the PA and the PLO should fail the test of effective control. The effective control test refers to the internal control an entity has over the territory and people within it.

However, there are some areas of Palestinian international relations which it could be said have been fully handed over from Israeli control. For example, the Cairo Agreement provides that,

"The PLO may conduct negotiations and sign agreements with states or international organisations for the benefit of the Palestinian Authority..."[125]

A vacuum of responsibility is not likely to be left in situations where there is such an agreement because the parties to the agreement (i.e. the PLO and the other signatory(ies)) would be in effect recognising the competence of the PA in the relevant area and also therefore its responsibility. Furthermore, only states or organisations which recognise the Palestinian Representation as a significant actor in the international community would be likely to enter into such agreements, therefore the question of at what point on the scale of personality an entity can incur responsibility is already answered in terms of its bilateral relationships. This practice demonstrates that a non-state actor, such as the Palestinian Representation may be internationally responsible in some situations such as in relation to agreements it enters into with third parties, despite its formal lack of full capacity under the DOP to enter into relations with the rest of the international community. As far as Israel is concerned, she is therefore absolved of any responsibility in relation to agreements entered into by the Palestinian Representation which come within Article V I b.[126]

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[123] Notably Chapter Three

[124] Annex II, Article 3 (b), DOP. It is possible that this is an attempt by Israel to stop the Palestine from achieving all of the requirements for statehood under the Montevideo Convention . For discussion of the Montevideo Convention see section 1.2 in Chapter One and section 1.1 in Chapter Three.

[125] Article V I b – related particularly to international agreements on economic matters within the West Bank and Gaza Strip.

[126] It could be said that the procedural issue arises as to how a party to an agreement concluded on the authority of the Cairo Agreement would respond to a breach of the agreement. Since Palestine is not a State and therefore has no access to the International Court of Justice (Article 34(1) of the Court's Statute provides that only States may be party to cases decided by the Court), then surely breaches could only be dealt with through diplomatic channels or *ad hoc* arrangements. However, it could also be submitted that since the authority for the PLO to conclude agreements for the benefit of the PA derives from the Cairo Agreement rather than from its personality that these treaties are not "international" agreements since

This evidence leads to the assumption that in the shape of the PA there exists a non-state actor which has a great deal of 'effective control' over much of Palestinian public life with which the administering authority is rightly not able to interfere.

The variable personality of the Palestinian Representatives can be said to lengthen the period of time before statehood is achieved because States can take different stances on the status of an entity. Therefore as a result of variable personality, in practice and because the Palestinian Representation has an unsurpassed level of personality for a national liberation movement,[127] surely they are an ideal candidate for incurring responsibility as a result of passing the effective control test prior to attaining full statehood.

As was discussed in section 2 above, even if an entity does fulfil the test of effective control, the issue of imputability is a complex one in relation to non-state entities. Therefore let us consider imputability in the Palestinian context by looking at similar scenarios to the four scenarios considered in section 2 in order to decide for whose actions the PA and the PLO could be held internationally legally responsible.

i) In section 2 the first scenario involved an official of the non-state entity shooting a UK citizen whilst carrying out official orders. In the Palestinian context the example could be the same, but the official could be a member of the Palestinian Police Force, for example.

It is submitted that the PA would be internationally legally responsible for injuries in such circumstances. International law clearly supports this proposition in relation to a State.[128] Therefore, since the PLO and the PA are in effective control of the actions of their police officers and other such agents of their organisations, they should be considered to be ultimately responsible for all actions which are carried out in an official capacity.

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they are not between States. On a similar point see Quigley, "The Israel-PLO Agreements: Are they Treaties?" (1997) 30 *Cornell ILJ* 717.

[127] See conclusion to Part I of thesis.

[128] As was discussed in section 2, the ILC was clear on the point that the State must take responsibility for the actions of its agents or organs when acting in an official capacity – See Draft Articles 5, 6 and 7.

It would seem unthinkable to attempt to attribute responsibility for the kind of actions described in the scenario above to Israel since she clearly has no control over the policy or personnel of the PLO and the PA.

ii) The second scenario described in 2 above concerned an official of the state who shot a UK citizen but in doing so was acting beyond the powers accorded to him by the non-state entity. In the Palestinian context this might be likened to a policeman shooting a UK citizen when he was sent to protect him from other Palestinian insurgents, as a result of his joining in with the uprising.

It is submitted that this is a harder situation to deal with since the action of the policeman is *ultra vires*. In section 2 it was demonstrated that the test to impute responsibility is a *de facto* test. Therefore, despite his actions being *ultra vires* the specifics of his orders, it is a fact that the gunman is a policeman, who perhaps owns the weapon as a result of his post and has also been called to the scene because of his post. The fact that he then acts beyond his powers does not negate the fact that there is an element of authority under which he has acted. Unless he held such a post it is unlikely that the event would have occurred. Therefore, it is possible to argue effectively that the principal-agency relationship would be fulfilled.

As in the previous example, this kind of scenario would be imputable to a state, therefore there seems to be no reason for it not to be imputable to the PA and the PLO simply because statehood has not yet been achieved. If the test of effective control is satisfied, then responsibility can only rightly be incurred by them. Indeed it must be incurred by them if the vacuum in responsibility is to be filled.

iii) The third scenario in section 2 can be likened to that of a UK citizen being injured by a brick thrown by a Palestinian who is a supporter of the PLO and is demonstrating against a curfew placed by Israel on a town in an area of the West Bank handed over to the PA.

In this situation, the test should once more be the same test as that applied to States. The case law of the Iran-US Claims Tribunal[129] proved to be most instructive in such

[129] See section 2 above.

situations. Therefore, unless there was a very strong direct link between the action of throwing the brick and incitement to do so by the PLO or the PA, it would be unlikely for international legal responsibility to be attributed.

iv) The fourth scenario from section 2 relates to the lack of means of redress for the wronged individual.

For non-state entities it is possible that providing a means of redress for aliens who are victims of unlawful acts may be problematic as the mechanisms in which redress might be sought may well not be set up until the movement is successful and achieves statehood. However, in the Palestinian situation judicial functions were given to the Palestinian Authorities through the DOP, therefore it is submitted that the PA would be internationally responsible for a failure to provide adequate systems for redress.[130]

This chapter puts forward the proposals that non-state entities in general should have the same tests for responsibility as States if they satisfy the test of effective control. Therefore, in the Palestinian situation, as a result of its extremely high level of international status and its relatively well-developed internal organs and agencies, the argument for the incurring of responsibility is even stronger.[131]

Benvenisti also argues that the PA should incur responsibility for wrongful acts within its competence on the basis that state sovereignty is not a prerequisite for international responsibility.[132] He relies on the changing nature of the sovereign state and the outdated Westphalian approach which is being slowly eroded by the increased number of actors on the international stage.[133]

The changing nature of the State-centric international society does mean that traditional notions of responsibility must also change if there is to be a comprehensive framework of law relating to international responsibility. Using the test of effective control, plus the usual tests regarding imputability, would then allow the reality of a situation and the

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[130] Article VII (2), DOP.
[131] A high level of status as demonstrated in Chapter Three.
[132] Benvenisti, "The Status of the Palestinian Authority", at 62 – 63.
[133] Benvenisti considers the responsibility of international organisations like the UN and the EU.

functions of those exercising authority to become the defining issue regarding responsibility.

This realistic approach would be much more in keeping with the theory of variable personality. It means that entities other than full sovereign states could be held liable for their actions or those of their agents. There would be no vacuum of responsibility and States could continue to exercise some discretion in awarding personality to an entity without fear that their own or their citizens rights are being swept under the carpet.

It is true to say that a State which wanted to enforce Palestinian responsibility, but did not choose to recognise it as a legal person, may find difficulties under this approach as it could be argued that bringing a claim amounts to *de facto* recognition. However, if it was widely accepted that non-sovereign entities can be held internationally responsible for their wrongful actions then the practical effect of any claims of *de facto* recognition would be minimised.

There is no doubt that the issue as to which forum such a claim could be brought is a significant hurdle to overcome. It is not impossible for a non-state actor to be party to a case in a national court.[134] Nonetheless, the lack of statehood makes the traditional mechanisms for dispute settlement (such as the International Court of Justice) unsuitable. It is not beyond the realms of possibility that a specific tribunal could be set up in which claims could be brought against a non-state entity, however there would have to be a sufficient number of claims to make this financially viable. Furthermore, such a step would be a very unusual one to make where one of the actors was a non-state actor with variable levels of personality.

The conclusion that the PA should be responsible for actions within the areas handed back to it rather than Israel is very important in relation to the theory that personality may be variable. However, whether any state would want to bring a claim, and indeed whether they would easily be able to before statehood was achieved is, to a degree, doubtful.[135] However, this does not change the fact that variable personality and the

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[134] For example, United States v PLO and Others 82 *ILR* 282 and Democratic Republic of East Timor, FRETILIN and Others v State of the Netherlands 87 *ILR* 73.

[135] For example, see the comments above and also in section 2 above regarding a few of the potential practical problems regarding the bringing of a claim.

existence of entities such as the PA leaves a discrepancy in the international law of state responsibility. Without a more inclusive approach to the responsibility of non-state actors, states are left to make decisions on when the level of an entity's personality is sufficiently high to incur responsibility by according statehood. Moreover this would also run the risk of further politicising recognition decisions.

CONCLUSION

This chapter has three main conclusions which are re-emphasised here in order to highlight the importance of the debate this thesis is raising and to demonstrate in clear point form the consequences which arise in relation to question of responsibility as a result of the existence of non-state entities with variable personality on the international stage.

First, overall it seems that the rules relating to state responsibility are not sufficiently up to date to take into account the changing types of actors on the international stage. Therefore the current international law governing international responsibility does not work compatibly with the theory of variable personality. When entities exist which have personalities governed by complex webs of many different bilateral relationships, rather than by the formation of international consensus regarding status, then surely the rules relating to responsibility need to be more flexible to incorporate these different types of actors with potentially variable personalities. This is important in situations like those in Palestine where there may be conflict and therefore personality may be most variable as these are also the situations where potentially many internationally wrongfully acts may be committed.

This first point leads on to the second main conclusion which has been a running theme throughout this thesis; international law is currently not a fully cohesive body of rules. By its very nature international law has been built up on an *ad hoc* basis. Therefore if attempts are made to codify it and place those rules in some order (as in the case of the ILC), it is surely better to do so by considering all relevant issues, including personality. For even if this does make consolidation a (even more) lengthy process, it should make the results far more useful and workable.

Third, in this chapter it has been shown by using the Palestinian example that without a re-think in the law of responsibility vacuums can appear where responsibility for internationally wrongful actions can be shirked.

However, this chapter has also shown that it is possible to construct a better framework for laws of responsibility which takes into account both variable personality and the rise in the number of non-state entities with international legal personality. The proposals to allow non-state entities to be subject to similar rules as states in the area of

responsibility are sensible and workable because they take a *de facto* approach to an entity's personality and also use well-known tests and principles. The proposals provide that an entity's functions and activities dictate the level of responsibility which it must incur. A functionalist approach is better because it allows the personality of actors on the international stage to be taken into account.

This results primarily in a more effective system of international law because it admits that personality can be variable and attempts to reconcile such variability with other areas of international law. In addition however, it deals with the reality of the increased number of non-state actors on the international stage and provides a workable set of tests aimed at ensuring responsibility for unlawful action is taken, rather than dismissed.

"Rather than grope for the seat of sovereignty, we should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures. Under this functionalist approach what matters is not the formal status of a participant...but its actual or preferable exercise of functions."[136]

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[136] Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" (1993) *EJIL* 447, at 453, also cited in Benvenisti, "The Status of the Palestinian Authority", at 63, footnote 58.

CHAPTER 5

VARIABLE PERSONALITY AND THE RIGHTS OF THOSE SUBJECT TO ITS JURISDICTION

INTRODUCTION

The previous chapter has looked at the link between variable personality and responsibility. This chapter continues with the theme of examining whether variable personality is reflected in other areas of international law. However, on this occasion this is in relation to responsibility in the specific context of the protection of human rights. Chapter Four was concerned with the responsibility of an entity with variable personality towards others on the international plane. In contrast, this chapter deals with the rights of those subject to the jurisdiction of such an entity within the areas it purports to control.

Once again the case study of Palestine will be used, for it is not a state but does have some form of personality on the international stage. Therefore, the issues here are the rights of Palestinians within the territories of the West Bank and Gaza Strip. It will be instructive in considering who is responsible for the implementation of international human rights norms and who is responsible for their breach in situations where an entity with variable personality exists. Palestine is a good example not only because it provides an classic example of variable personality in practice, but it is also a situation where human rights have been at the forefront of much international concern.[1]

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[1] As evidence of this international concern the UN set up a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Populations of the Occupied Territories (although it should be noted that there has been much controversy affecting the work of this committee – see Dinstein, "The Israeli Supreme Court and the Law of Belligerent Occupation: The Reunification of Families" (1988) 18 *Is. YHR* 173, at 172). See also Falk & Weston, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza Strip" and Dugard, "Enforcement of Human Rights in the West Bank and Gaza Strip" both from Playfair, *International Law and the Administration of the Occupied Territories* (Oxford: Clarendon Press) (1992), at 125 and 461 respectively, both of which detail much of the international concern regarding the West Bank and Gaza Strip.

The protection of human rights is a classic example of an area of law to which the main responses which result in improvement of the situation must occur via the state.[2] This is logical given that a state is generally considered to be the body which is thought of as being capable of violating an individual's human rights. However, with the emergence of non-state entities with variable personality which also have significant powers at a domestic level, such as in Palestine, the time has come for a reappraisal of the protection afforded by international law. As stated in the previous chapter regarding international responsibility, the theory that personality is variable is not acknowledged by international law therefore it of course has not taken it into account. In the light of this the time for a re-assessment of the law has surely come.

In order to tackle this reappraisal, this chapter is split into five main sections.

The first section begins by considering the fact that in situations of upheaval or conflict, like that in Palestine, there is often abuse of human rights. In this kind of situation where there are two entities claiming conflicting rights against each other it would not be unusual for one of them to be a non-state entity with a variable level of personality. Examples of abuse of Palestinians in the West Bank and Gaza Strip by Israeli and Palestinian Authorities are provided.[3] Overall, this section aims to introduce the main issues and looks at the ways in which the human rights of a population may be protected in such situations. This involves an examination of whether the West Bank and Gaza Strip can be classed as occupied territories since the time of the DOP. It is important to discuss this question at this stage as the answer will assist in deciding what kind of human rights regime could be used to protect the inhabitants of the West Bank and Gaza Strip and also whether the Israeli or Palestinian Authorities should implement it.

Section 2 aims to look at the realities of the situation in Palestine and begins to consider in practice how human rights are protected there since the time of the creation of the PA and whether this is compatible with the existence of an entity with personality. This involves examining whether international human rights law or international

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[2] See for example, Dean, "Beyond Helsinki: The Soviet View of Human Rights in International Law" (1980) 21 *Virg. JIL* 55; Emerson, "The Fate of Human Rights in the Third World" (1975) 27 *World Politics* 210; McDougal, Lasswell and Chen, *Human Rights and World Public Order* (New Haven: Yale University Press) (1980); Tunkin, *Theory of International Law* (London: Allen & Unwin) (1974), at 81.

humanitarian law is the more appropriate system to use in order to achieve responsibility for human rights in situations where there is variable personality.

Section 3 will then consider what kind of human rights regimes a situation like that in Palestine could be subject to in order to ensure compatability between variable personality and human rights protection.

Following on from this section 4 examines whether there are any other possibilities apart from human rights law or international humanitarian law which may be suitable for improving the human rights of those affected by an entity with variable personality.

The final section forms the conclusions to this chapter and considers what the overall consequences for the protection of human rights may be if an entity with variable personality exists and can have an impact on the lives of a population.

Before the main discussion begins it should be noted at the outset that this chapter deals primarily with the concept of variable personality in relation to general human rights protection. In order for the implications of variable personality to be the focus, this means that on occasions the descriptions of human rights mechanisms or the full picture of human rights as protected through international law are only dealt with in brief. This is regrettable yet intentional due to the time and space constraints of a thesis compared with the vast array of international human rights law which could be examined.

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[3] It should be noted that this chapter deals only with abuse within the areas of the West Bank and Gaza Strip. The issue of the abuse of Palestinians who live in Israel by Israeli Authorities is a separate question which is not examined here.

1: THE PROBLEM OF HUMAN RIGHTS ABUSE IN SITUATIONS WHERE THERE IS ALSO AN ENTITY WITH VARIABLE PERSONALITY.

Without intending to over-generalise, it tends to be the case that in situations where there is an entity with variable personality – for example, an emerging state (as in the case of Palestine) – there is often a degree of conflict.[4] This is often caused by the conflicting claims to territory or governance of a people, which are often made by a non-state entity such as a liberation group, which then clashes with the existing state and government.

As a result of conflict it is an unfortunate fact that there are often wide scale abuses of human rights. These may be because one side carries out abuses against the other side in order to further their cause, as for example occurred in some of the power upheavals in South America where there were many disappearances, cases of torture or extra-judicial killings.[5] Human rights abuses could also occur in a conflict situation because of a heightened state of emergency caused by the conflict which results in existing human rights protection being lessened.[6]

It is therefore a foreseeable problem that human rights abuse and the existence of entities with variable personality are not unusual partners. As mentioned above, Palestine is a classic example of this link. The following section gives a few brief examples of human rights abuse in Palestine in order to place this chapter in context.

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[4] See also the example of the situation in Somali described in the Elmi v Australia *Communication no. 120/1998*: Australia. 25 May 1999, CAT/C/22/D/120/1998 which was discussed in the introduction to Part II of this thesis. In Somalia there was conflict between an entity with variable personality – the Hawiye clan which was in effective control of some parts of the territory – and the State.

[5] See Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment" (1994) 16 *HRQ* 656; Crahan, "The Salvadoran Truth Commission in Comparative Perspective" and Roniger and Sznajder, "The Legacy of Human Rights Violations and the Collective Identity of Redemocratized Uruguay" (1997) 19 *HRQ* 55.

[6] For example, parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, *UKTS* 71 (1953); 213 *UNTS* 22, can choose to derogate from some of the articles under Article 15 when there is a state of emergency. There are similar provisions in the International Covenant on Civil and Political Rights 1966, *UKTS* 6 (1977): 999 *UNTS* 171, in Article 4 (1).

1.1: The Human Rights Problem in the West Bank and Gaza Strip.

Human rights have long been discussed in relation to the population of the West Bank and Gaza Strip because of the difficult and traumatic history of the area. Like the entire chapter, this section considers only the abuse suffered by Palestinians within the West Bank and Gaza Strip at the hands of both Israeli and Palestinian Authorities. Many different kinds of abuse have occurred, ranging from abuses of the right to life (notably during the intifadah[7]) to violations of property rights (notably during the struggles for territory between 1948 and 1967[8]). Since the Israeli occupation of those areas in 1967 the situation in relation to some human rights has been accentuated because of the increased number of terrorist attacks against Israel. Aside from the issues surrounding the abhorrence of terrorism in general and the human rights abuses such attacks create in themselves, the potential for abuse of the rights of detainees is particularly apparent.[9]

However, allegations of human rights abuses since the DOP have not only been made against Israel. The PA has had its share of allegations and investigations into activities alleged to be in breach of the human rights of the population of the West Bank and Gaza Strip. The following two sections aim to give a pen-portrait of the situation and outline some of the main types of abuse which have been reported on both the Israeli and Palestinian sides in the West Bank and Gaza Strip in order to place the chapter in context. Since it is intended that this chapter should deal primarily with human rights in the context of the variable personality theory, the descriptions below are inevitably superficial, for human rights in the West Bank and Gaza Strip are worthy of being a major area for study in themselves.

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[7] See for example the Human Rights Committee's concerns about "the number of Palestinians who have been killed by the Security Forces...The Committee express concern over the use of rubber coated metal bullets by the security forces in the occupied territories in dispersing demonstrations...This type of bullet is reported to have killed many Palestinians, including children." - Concluding Observations of the Human Rights Committee: Israel (18 August 1998) CCPR/c/79/Add. 93. Para. 17.

[8] See for examples of violations – Benvenisti and Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement" (1995) 89(2) *AJIL* 295.

[9] Regarding the issues surrounding the conflict between terrorism and respect for human rights and possible approaches to resolve such conflict, for an Israeli approach see, Cotler, "Israel, Terrorism and Human Rights: The Dilemma of Democracies" from Kellerman, Siehr and Einhorn (Eds.), *Israel Among the Nations* 111.

1.1.1: Human Rights Abuse by Israel in the West Bank and Gaza Strip

The Israeli abuse of human rights within the West Bank and Gaza Strip has been extremely well documented by *inter alia* many different types of non-governmental organisations, academics and international organisations.[10] The UN in particular set up a Special Committee to examine and respond to Israeli Practices in the Occupied Territories which reports periodically and annually to the General Assembly.[11] The General Assembly, with the human rights of the Palestinian people in mind, also established the Committee on the Exercise of the Inalienable Rights of the Palestinian People.[12] This committee was created in order to recommend to the Assembly a programme of implementation (for the exercise of the inalienable rights of the Palestinian people), on the part of the UN and its principle organs.

The fact that Israel has carried out human rights abuses does not in general appear to be disputed[13] and abuses have spanned a wide range of rights;

> "...deportation, collective punishment, detention without trial, house (and town) arrest, torture, arbitrary lethal shootings, and the restrictions imposed on the freedoms of speech, press, association, and assembly in the Occupied Territories. Probably the most telling of these reports is that of International Center for Peace in the Middle East which, according to its preface, 'was written by Jews who grew up in Israel, and whose beliefs were shattered before their eyes by their findings in the Occupied Territories.'"[14]

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[10] A small sample of such reports by way of example are, Amnesty International, *Report and Recommendation of an Amnesty International Mission to the Government of the State of Israel,* 3 – 7 June 1979; See Dugard, "Enforcement of Human Rights in the West Bank and the Gaza Strip", at 461 for substantial noting of reports; Dinstein, "The International Law of Belligerent Occupation and Human Rights" (1978) 8 *Is. YHR* 104; Committee on the Exercise of the Inalienable Rights of the Palestinian People, established by General Assembly Resolution 3376 (XXX), 10 November 1975; the West Bank Data Base Project, which is a privately funded organisation based in Jerusalem, which was founded in 1982 with the aim of cataloguing data relating to Israeli policy in the West Bank; and The International Committee of Jurists.

[11] Set up by virtue of General Assembly Resolution 2546 (XXIV), 11 December 1969. For lists of the relevant UN resolutions to the Special Committee and the reports of the Committee itself, see http://www.un.org/Depts/dpa/qpal/sp_rpts.htm

[12] General Assembly Resolution 3376 (XXX), 10 November 1975. The Committee was a supporting unit of the Secretariat and became the Division for Palestinian Rights in the 1978.

[13] "The settlement of more than 55,000 of Israel's Jewish citizens in the West Bank and Gaza (plus nearly 100,000 in East Jerusalem) and the establishment of approximately 120 settlements there; the refusal to repatriate thousands of Palestinians displaced during the 1967 fighting; the summary deportation of prominent Palestinian citizens from many walks of life (including lawyers); systematic arbitrary arrests and detentions and the denial of procedural rights in respect of alleged security violations; the imposition of collective punishment, especially in the form of the destruction of family residences; and the mistreatment (including torture) of detainees – all these and other abusive policies and practices directed at the Palestinian population as a whole are a matter of record." – Falk & Weston, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza", at 127 – 128.

[14] Dugard, "Enforcement of Human Rights in the West Bank and the Gaza Strip", at 462.

It appears clear that abuse is perpetrated by Israel towards Palestinians and therefore as a fact this is not in question. It then remains, later in the chapter in section 2, to examine what international mechanisms exist to attempt to deal with these abuses and how these are applied in relation to the West Bank and Gaza Strip both by Israel and towards Israel by the rest of the international community.

1.1.2: Human Rights Abuse by the Palestinian Authority in the West Bank and Gaza Strip

Since soon after its inception, the PA have been heavily criticised by a broad range of bodies for their human rights abuses. [15] As mentioned above, much of this has centred around their treatment of detainees, illegal detentions and arrests and concerns regarding due process because of the intent of the PA to attempt to suppress terrorism and violence both within the West Bank and Gaza Strip and attacks directed against Israel.[16]

As was the case when Israeli abuses of human rights were considered above, there is no need to go into great depth regarding examples of abuse by the PA because the number of reports by well-respected human rights monitoring bodies speak for themselves. However, by way of example and to set the scene regarding the type and scale of abuse a few examples of specific human rights abuse are laid out below. One recent incident in particular demonstrates some common human rights abuses. It also shows the heavy handed way in which the PA sometimes deals with Palestinians.

In February 2000 the French Prime Minister, Lionel Jospin visited the West Bank and made a number of speeches and public appearances. One of these was to Bir Zeit University which has traditionally been active in the Palestinian struggle for

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[15] See for example *inter alia,* Human Rights Watch/Middle East, *Palestinian Self-Rule Areas: Human Rights Under the Palestinian Authority* 39 (September 1997); Human Rights Watch, *Human Rights Watch World Report* (1998); Fishman, "Palestinian Human Rights Suffer from Official Corruption, (1998) 351 *Lancet* 425, at 425 (also cited in Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 271, footnote 74); Robinson, "Authoritarianism with a Palestinian Face" (1998) January *Current History* 13; Human Rights under the Palestinian Authority: Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, 104th U.S. Congress (1996) 77 (also cited in , Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 275 footnote 90); Hunter, "Human Rights Violations by the Palestinian Authority" 579 *MEI* 6; Usher, "A Gathering Storm" 614 *MEI* 4.

[16] It has been suggested that one of the main reasons behind PA abuse of human rights of detainees is as a result of United States and Israeli pressure to crack down on terrorism – see Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 274.

independence. In the previous few days there had been a number of clashes between students and Israeli soldiers. Then, on 22 February the students staged a demonstration in support of Hizbullah which had taken action against Israel in the then Israeli occupied area of Southern Lebanon. Two days later at a press conference Jospin referred to action taken by the Hizbullah in Southern Lebanon as a "terrorist attack". On the occasion of his visit to Bir Zeit on 26 February he gave a lecture on the rule of law and then refused to retract his statement about terrorism. On leaving the University he was pelted with stones by angry students.[17] During the following week it was reported that about 120 students were arrested without charge by the PA's security services. Human Rights groups also stated that some of them had been tortured using methods such as beatings, hoodings, and being kept in painful physical positions – similar methods that were last year outlawed by the Israeli Supreme Court.[18]

This kind of incident resulting in abuses of the right to freedom from torture and inhumane or degrading treatment and freedom from arbitrary arrest and imprisonment have not been uncommon in recent times in the West Bank and Gaza Strip.[19] However, these are by no means the only rights which the PA has allegedly infringed.

There have been a number of reports which accuse the PA of gagging freedom of expression amongst the Palestinian press in order to ensure that the PA is described in the most favourable light and so maintain its popularity.

For example, one of the Islamic Jihad leaders, Shaykh 'Abdallah al-Shami, was arrested in April 1999 because of remarks he made regarding the PA during a sermon and was detained for three days. In August he was rearrested and held for 41 days in solitary confinement without charge or trial as a result of a newspaper article he had written

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[17] See Usher, "The Jospin Affair" 620 *MEI* 10 March 2000 8.

[18] Supreme Court of Israel: Judgment Concerning the Legality of the General Security Services' Interrogation Methods, 6 September 1999 (1999) 38 *ILM* 1471. It has been suggested that many of the PA's security services may have learnt these techniques from time spent under Israeli detention.

[19] For other methods of torture and examples of abuse see, Amnesty International, *Palestinian Authority: Prolonged Political Detention, Torture and Unfair Trials,* http://www.amnesty.org.uk/reports/palestine/index.html, cited in Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 272 footnote 81. See also the Amnesty Report 1999 for the PA which states that at least 450 people were arrested on political grounds during 1999 which includes people accused of criticising the PA, people suspected of being supporters of Hamas and Islamic Jihad and people suspected of 'collaborating' with Israel – http://www.amnesty.org/ailib/aireport/ar99/mde21.htm

which criticised a PA cabinet reshuffle.[20] This kind of action strikes at the heart of the individuals right to freedom of expression and also abuses the rights of detainees.

The PA has also attempted to gag the press by taking action against newspapers which have flouted the strict PA line. For example, when *al-Umma* printed a caricature of Yasser Arafat in May 1995 it was warned by the Palestinian Preventive Security Service that it should not release that edition. Many copies were seized by the Security Service, but when the paper in a future edition criticised the Security Service there was an arson attack on the *al-Umma* offices and the owner was threatened. As a result the owner closed the offices and ceased publication.[21]

This kind of behaviour on the behalf of the PA clearly does not fall in line with internationally accepted human rights standards. The outcome has been a kind of self-censorship of the press:

> "...Newspapers are afraid to write anything that might annoy the PA. Instead, they count on WAFA, the official Palestinian News Agency, for what they know is OK to print."[22]

These kind of incidences of human rights abuse on the part of the PA are made more problematic by the lack of the rule of law in the West Bank and Gaza Strip. There is also a lack of separation of powers between the Executive, Legislative and Judicial elements of government which leaves the Courts restricted in their capacity to challenge PA action. The courts' inability to uphold the rule of law then results in failure to remedy human rights abuses or to provide examples of acceptable and non-acceptable conduct on the part of the Palestinian Authorities.

Most political decision making power within the PA rests in the hands of Yasser Arafat – as evidenced by his refusal to sign the new Palestinian Basic Law despite agreement upon it by the elected legislative council.[23]

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[20] Amnesty 1999 Report, *ibid.*
[21] Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 279.
[22] Words of Palestinian journalist, Ghassan al-Khatib, cited in Bisharat, *ibid.*, at 280 – 281.
[23] The Basic Law is the proposed Palestinian constitution which if enacted would give firm grounding to the rule of law in Palestinian political and legal life. Note also the reporting of Arafat appointing the judiciary on the basis of political belief rather than merit – Rishmawi, "Features of the Administration of Justice under Palestinian Rule" (1994) 53 *Rev. Int. Comm. Jur.* 25, at 31 – 32.

There is no doubt that the lack of specifications regarding the rule of law or separation of powers within any of the primary documents which set up Palestinian self rule are partly to blame for this situation.[24] The DOP has no mention of the rule of law at all. This is surprising given that there is surely a need to set a firm foundation for the legitimacy of the PA and its activities. Article XIV of the *Gaza-Jericho Agreement* does mention the rule of law but provides no information about how a culture which respects the rule of law can be created.[25] The lack of rule of law means that those in authority are able to perpetrate human rights abuses without being subject to the usual checks and balances which would operate in a democratic system where power is spread among parts of the structure of the state in order to prevent dictatorship. Article VIII of the agreement provides that:

> "Any person or organisation affected by any act or decision of the Ra'ees of the Executive Authority of the Council or of any member of the Executive Authority or the Council or of any member of the Executive Authority, who believes that such act or decision exceeds the authority of the Ra'ees or of such member, or is otherwise incorrect in law or procedure, may apply to the relevant Palestinian Court of Justice for a review of such activity or decision."

This is obviously a helpful provision in terms of implementing the rule of law in the territories, however unless the courts are independent and fair in their decision making (which has been questioned) the practical effect of any such provisions is limited.[26]

The PA has also established *Security Courts* in the autonomous areas of the West Bank and Gaza over which human rights organisations have raised concern because of the lack of knowledge surrounding their procedure and composition.[27] The public are not allowed to attend trials, many of which have been alleged to be unfair and too secretive to ensure the rights of the defendant.[28] Human Rights Watch have stated that,

> "Trials have usually been held at night, within hours of arrest, and have often lasted only minutes. Defendants have been systematically denied the right to be represented by independent counsel, bring witnesses, or appeal their verdicts. The judges have no judicial experience, having served in neither the ordinary criminal nor the military courts."[29]

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[24] See *ibid.*, at 33 – 34 for practical examples of ways to improve the internal administration of justice within the West Bank and Gaza Strip.
[25] Cairo Agreement on the Gaza Strip and the Jericho Area, 4 May 1994 (1994) 33 *ILM* 622, Article XIX: "Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law." (hereafter Gaza-Jericho Agreement)
[26] Rishmawi, "Features of the Administration of Justice under Palestinian Rule".
[27] *Ibid.*, at 41.
[28] See http://www.amnesty.org/ailib/aireport/ar99/mde21.htm and *ibid.*
[29] Cited in Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 272.

Furthermore, the High Court for State Security[30] convenes only at the request of the executive – which is headed by Arafat and is therefore a gross infringement of the traditional democratic principles of the separation of powers.[31]

There is also a military court system within the West Bank and Gaza Strip. Its main function is to try cases regarding the duties carried out by individual members of the Palestinian Security Services. Similar criticisms have been levelled at the procedure in the Military Courts as to the Security Courts since they both operate the same procedure. It is reported that there is a scant chance of effective appeal from either of these courts since the High Court, which is officially the highest legal authority within the West Bank and Gaza Strip has stated that it will not consider appeals from the Military Courts because it is not within its jurisdiction.[32]

The lack of opportunity for appeal is reinforced by the speedy nature of punishment meted out by the Military Courts. For example, in August 1998 a death sentence imposed on two members of the Palestinian Security Services was carried out only four days after the crime.[33]

The rule of law is thus in serious danger of disappearing as an effective safeguard for the rights of individuals in the West Bank and Gaza Strip (if it ever really existed). It is unfortunately unlikely that until there is greater money pumped into areas such as training and development of lawyers, legislative drafters and Ministry of Justice staff there will be a change in the application of laws which can create a culture where the rule of law is observed. More money would obviously be a step in the right direction, however until wholesale change and unification of the legal system occurs, alongside a greater respect for the doctrine of the separation of powers, it is difficult to imagine how this will impact on the rights of individuals.

Given the types of abuse described above on both the Palestinian and Israeli sides the questions then arise as to how the international community responds in order to attempt to stop the abuse and in some cases provide a remedy for those who have been wronged.

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[30] Established by a decree by Arafat in February 1995.
[31] See Bisharat, "Peace and the Political Imperative of Legal Reform in Palestine", at 272.
[32] *Ibid.*

The following section aims to consider how this could be achieved in the Palestinian situation by looking at the possible responses of international law to situations of human rights abuse. However, this is done by keeping in mind the specific circumstances of the Palestinian situations and the status of the relevant parties.

1.2 How can international law make a difference in situations where there is human rights abuse and a variable level of personality?

International law attempts to provide a certain level of protection against human rights abuse and has been the subject of much international study regarding its success in terms of setting out basic standards of treatment for individuals.[34] However, beyond that which is noted in the footnotes, the basics and development of such protection will not be discussed here in detail as there is neither time nor space, for it is submitted that as it stands, all the usual mechanisms of human rights protection are not directly relevant to the situation in the West Bank and Gaza Strip because of its specific circumstances.

This is because, as discussed in Chapter Three the Palestinian situation is one of variable personality. This variable personality means that a "normal" system of government does not operate in the areas of the West Bank and Gaza Strip. In terms of the international protection of human rights this means that the usual mechanisms for protection do not apply as Palestine is not yet a state under international law, but has a variable level of personality depending on whom it is operating with at that time.

In situations of major breakdown of the usual systems of government, international humanitarian law is often applied in order to provide some level of basic protection for human rights and those involved in the situation of conflict.[35] Once again, the details of

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[33] Trounson, "Palestinian Brothers Executed Four Days After Crime" *Los Angeles Times* August 31 1998 A6 cited in Bisharat, *ibid.*, at 278 – 9.

[34] An understanding of possible ways in which human rights can be protected at an international level is required in order to question whether they can be applied in a situation of variable personality. Basic knowledge is assumed as it seems that such a long excursus is unsuitable in this chapter because of time and space. However at relevant points in the Chapter some basic information is provided.

[35] As in relation to international human rights law international humanitarian law is not discussed in detail in this Chapter and a basic level of knowledge is assumed. However, it should be noted here that perhaps

international humanitarian law will not be entered into here beyond that which is mentioned in the footnotes for they are a topic worthy of study entirely on their own. However, the fact that Palestine has a variable personality and therefore some level of independence means that the application of international humanitarian law also raises some problems.[36]

Some have tried to reconcile the applicability of human rights instruments to situations of occupation.[37] Indeed General Comment 26 of the Human Rights Committee suggests that human rights protection once afforded to a people cannot be taken away even if there is a change in the administration of a state.[38] This will be discussed later in this chapter in section 2.1.1.1. However it should be mentioned here that General Comment 26 is possible to distinguish in the Palestinian situation because of the fact that the people of the West Bank and Gaza Strip have never truly been part of a State and therefore never been subject to the Protection referred to by the Committee through their own government and a signing of human rights treaties on their behalf. The international legal position is not clear as it appears that no one area of law attempts to deal with situations where an entity with variable personality exists and has power over the lives of those subject to its jurisdiction. This means that this topic is ready for reappraisal. Therefore, the question which this part of the chapter aims to address is whether international human rights law or international humanitarian law is the more suitable or more intended mechanism for protecting the human rights of the people of the West Bank and Gaza Strip.

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the most important function in the law of occupation which should be borne in mind is the temporary nature of occupation and the lack of transfer of sovereignty to the occupant. In order to achieve this the Conventions have a large number of provisions which require the occupant to protect the territories existing social, legal and political institutions. The administration of the occupied territory must "ensure as far as possible public order and safety while respecting, unless absolutely prevented, the laws in force in the country" (Article 20, Hague Regulations). Note also Article 46 of the Hague Convention (Hague Regulations annexed to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land 9 *UKTS* (1910)) and Article 27 of the Geneva Convention IV (Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) August 12 1949, 75 *UNTS* 287) These Articles deal with the preservation of existing private relations between citizens of the territory. Also articles 50 and 24 of the Geneva Convention IV deal with the provision of education. Changes can only be made for military necessity, to restore public order or as provided for in Article 43 as mentioned above. On this issue see also, Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation" (1985) 37 *Stanford LR* 1573, at 1583 – 1591. Regarding Geneva Convention IV see Pictet (Ed.), *Commentary on IV Geneva Convention Relative tot the Protection of Civilian Persons in Time of War* (Geneva: ICRC) (1958).

[36] See section 2.2.

[37] See Quigley, "The relation between human rights law and the law of belligerent occupation: Does an occupied population have a right to freedom of assembly and expression? (1989) 12 *Boston College International and Comparative Law Review* 1 and Roberts, "What is a Military Occupation?" (1985) 55 *BYBIL* 249.

The answer to this question depends on various issues, however it is firstly important to establish whether the West Bank and Gaza Strip are areas to which international humanitarian law is applicable as this has been a disputed point. Humanitarian Law is dealt with here before human rights law simply because the tests which are used to establish whether or not the West Bank and Gaza Strip are occupied territories are useful in terms of understanding whether it is the PA or Israel towards whom international human rights law should be aimed.

1.3 : Are the West Bank and Gaza Strip in a situation of belligerent occupation?

It should first be noted that within the scope of international humanitarian law, it is the law of occupation which is of concern to the issue at hand. The laws of neutrality or the laws relating to the treatment of prisoners of war may also be interesting areas of study when linked to variable personality. However for the sake of time, space and particular relevance to the Palestinian situation, the law of occupation is examined here. The law of occupation attempts to balance the military needs of the occupier, the humanitarian needs and interests of the occupied and the needs of the displaced government.[39]

The question arises as to when a territory is considered to be occupied, however the answer has changed and developed over time.[40] Prior to the 1907 Hague Convention which led to the Hague Regulations there was an assumption that belligerent occupation occurs in the context of armed conflict and consists of direct control over the local

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[38] Committee on Human Rights, *Continuity of Obligations* 8 December 1997, General Comment No. 26 61st Session.

[39] See Kuttner, "Israel and the West Bank: Aspects of the Law of Belligerent Occupation" (1977) 7 *Is YHR* 166, at 169 and also Goodman's discussion of the two main functions of occupation, known as the "Rousseau-Portales doctrine" in Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation", at 1579 – 1580. McDougal and Feliciano use the principles of military necessity and humanitarianism as the complementary yardsticks by which to judge actions of the occupant: McDougal & Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press) (1962), at 739. For more basic information regarding the law of occupation in general see Kalshoven, *Constraints on the Waging of War* (Geneva: International Committee of the Red Cross) (2nd Ed.: 1991); Cassese, *The New Humanitarian Law of Armed Conflict* (Napoli: Editoriale Scientifica) (1979); von Glahn, "The Occupation of Enemy Territory" (1963) I *Whiteman Digest of International Law* 946 – 98 and (1968) X *Whiteman Digest of International Law* 540 – 98 and Morgenstern, "Validity of Acts of the Belligerent Occupant" (1951) 28 *BYBIL* 291.

[40] For a brief, yet comprehensive overview of the history of the law of occupation and also the current law of occupation, see Goodman, *ibid.*

population through having control over the government and its agencies. However Article 42 of the Hague Regulations clarifies the position:

" Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Article 43 (1) goes on to refer to "...authority of the legitimate power **having passed** into the hands of the occupant..."[41]

Both these articles suggest that the important issue regarding the commencement of occupation is the obtaining of practical control of the territory (in part or whole). This is reaffirmed in Common Article 2 of the 1949 Geneva Conventions[42] which provides that,

"In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if a state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed assistance..."[43]

The above tests both clearly take a practical and *de facto* approach to decisions regarding occupation. As was discussed in the previous chapter the situation regarding "effective control" is more complicated since the establishment of the PA and the handing over of power within some areas of the West Bank and Gaza Strip.

The question of whether Israel or the PA has effective control over the West Bank and Gaza Strip has already been discussed.[44] However, it is worth recalling the Cairo

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[41] Emphasis added.
[42] Convention for the Amelioration of the Condition of the Wounded, Sick in Armed Forces in the Field (Geneva Convention I) August 12 1949, 75 *UNTS* 31; Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) August 12 1949, 75 *UNTS* 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) August 12 1949, 75 *UNTS* 135; Geneva Convention IV. There are also two Additional Protocols to the Geneva Conventions: Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), opened for signature December 12 1977, (1977) 16 *ILM* 1391 and Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), opened for signature December 12 1977, (1977) 16 *ILM* 1442.
[43] See also, Article 1 (3) of Additional Protocol I which provides that "This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions."
[44] See Chapter Four, sections 2.1 and 2.2 on the test of effective control and imputability (which also considers effective control) and also sections 3.2 and 3.3 which apply the tests of effective control to the West Bank and Gaza Strip.

Agreement which established the first phase of the implementation of the interim agreements. It states the position that,

> "Israel shall exercise its authority through its military government, which, for that end, shall continue to have the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law."[45]

The reference to international law could in this situation be considered to relate to the law of occupation governed by the Geneva Conventions. Therefore, under the international law of occupation it could be inferred that Israel would be considered to have effective power within the territories.

However, as was discussed in Chapters Two and Three, there are many areas of public life which have been handed over to the PA to control. In practical terms this means that in the areas handed back to the PA the effective controlling power is that of the PA rather than Israel. Although Israel still has a varying degree of influence in those areas as a result of Israeli troop withdrawals it can also not really be said to occupy them in the traditional sense.[46] This is a novelty in the international laws of occupation, indeed the Geneva Conventions are not framed in a way to deal at all well with questions of responsibility in such a situation.[47]

The law of occupation's inability to deal with a situation where effective control is held by two entities, Palestine and Israel, is evidenced once again:

> "The test for effective control is not the military strength of the foreign army which is situated outside the borders that surround the foreign area. What matters is the extent of that power's effective control of civilian life within the occupied area; their ability, in the words of Article 43 of the Hague Regulations, to 'restore and ensure public order and civil life.'"[48]

It seems that unless the power is held by one entity international humanitarian law is unable to cope effectively with a situation. The tests do not allow for some power relating to certain issues to be in the hands of one party while other remnants of authority rest in the hands of another.

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[45] Article V 3 (b), Gaza-Jericho Agreement. Signed in Cairo on 4 May 1994.
[46] As discussed in section 2.1 above.
[47] Benvenisti, "The Status of the Palestinian Authority", at footnote 50 notes that Article 6(3) of Geneva Convention IV states that an occupant is only relieved of its duties under the Convention one year after the close of military operations "to the extent that such Power exercises the functions of government in such territory". This cannot be said to apply directly to the current situation in Palestine for as is discussed above and as Benvenisti points out, Israel no longer occupies all of the disputed territories.
[48] *Ibid.*, at 56 – 57.

Given that authority for civil life has now been handed over to the PA within the Gaza Strip and parts of the West Bank, it is unlikely that Israel can be classed as an occupant in the usual sense under international law, however it must be noted that it still has a degree of control in some aspects of Palestinian life, such as foreign affairs.[49]

Since the establishment of the above conventions, however, it has also emerged that the Conventions apply to most situations of occupation even though occupation may take on different forms and varying arguments may be put by either party as to the status of territory and the reason for occupation.[50] Furthermore, the rules laid down in both the Geneva Conventions[51] and the Hague Regulations[52] are generally considered to be declaratory of customary law in the area. In which case the stance of either party is irrelevant to the legal status of the rules and therefore their objective applicability to the issue at hand.

An alternative way to approach the current style of occupation of the West Bank and Gaza Strip is to look at the different level of Israeli occupation within different parts of the territories depending on the state of Israeli troop withdrawal.[53] Whilst both the PLO and the Israeli government view the West Bank and Gaza Strip as a single territorial unit, after the DOP the territory was marked into three uneven areas, (termed areas 'A', 'B' and 'C' by the interim agreement) which each related to three different stages of Israeli withdrawal and PA competence.[54]

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[49] For example, under Article 43 of the Hague Regulations an occupant would be capable of "Restoring and ensuring public life" – however, Israel has clearly handed competence for many areas of public life over to the PA.

[50] See Roberts, "What is a Military Occupation?".

[51] The Geneva Conventions have almost achieved universality having been ratified by 188 states. Additional Protocol I has been ratified by 153 states (notably excluding the USA and Israel). However, it is noted that compliance with the Conventions coupled with *opinio juris* is a better indicator of customary international law, on this point see, Meron, "The Geneva Conventions As Customary Law" (1987) 81 *AJIL* 348.

[52] Roberts and Guelff note that, "The International Military Tribunal at Nuremburg in 1946 expressly recognised 1907 Hague Convention IV as declaratory of customary international law.": Roberts and Guelff (Eds.), *Documents on the Laws of War* (Oxford: Clarendon Press) (3rd Ed.: 2000), at 44.

[53] See the discussion on this way of approaching the situation in Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Process* (Oxford: Oxford University Press) (2000), at 175 – 176.

[54] Paragraph 1 of Article XI of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995 (1995) 36 *ILM* 551 provides that, "The Two sides view the West Bank and the Gaza Strip as a single territorial unit the integrity and status of which will preserved during the interim period.". Article XI then goes on to portion the West Bank and Gaza Strip into three categories, A, B and C, from which Israel will withdraw at different points during the peace process (the deadlines laid down

Since, as discussed above, the test for establishing occupation is a factual one of actual control, it could be said that whether Israel occupies Palestine changes, depending on which part of Palestine is under consideration at any one time. In area A for example, the PA has the full complement of authority which it is capable of achieving and there has been Israeli withdrawal. Therefore it could be argued that Israel is no longer an occupant in Area A. In Area C there has not been Israeli withdrawal thus it is possible to argue that Israel must continue to be classed as an occupant in that part of the territory. However, Area B is more complicated. The PA exercises some power there and is responsible for "public order", but Israel continues to have a degree of military presence there and has a overarching responsibility for protecting Israelis living within the area and "confronting the threat of terrorism".[55]

This approach means that the degree of occupation could change within a territory and that therefore parts may be considered still to be occupied while other areas are under independent control. Whilst it is submitted that the Palestinian peace process has resulted in a unique entity in the shape of the PA, it is also submitted that often struggles against occupiers result in situations where the occupied territory's army is in control of parts of the territory whilst the belligerent occupant still holds other parts itself. It is questionable whether the law of occupation should encourage this division of territory as it could mean that the occupant is more liable to give over some degree of control to the occupied if it results in lessening the degree of their own responsibility. Theorising aside, however, this approach still makes Israel the clear occupant in Area C and possibly Area B.

Overall, the main point which can be gleaned from either approach to the determination of whether Israel occupies some or all of the Palestinian territory is that in its current form the law of occupation does not really provide a useful framework of rules for situations such as the Palestinian one where there is a varying degree of control on the part of both the occupant and the emerging government. The test given to establish occupation in the Hague Regulations is a step in the right direction as it makes the question one of fact. With such a test the realities of a situation become the defining factor in questions of status. However, what the law of occupation then fails to do is respond to situations which do not fit neatly into the "occupied" or "not occupied"

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have rarely been adhered to). Areas A and B are generally more populated areas and as such the PA has more power and there have been greater withdrawal of troops from these areas.

categories. Situations of variable personality where there is a long transitional stage between full occupation and full independence are particularly likely to fall between these two stages and thus international regulation of such semi-occupation is not established.

However the debate over whether the West Bank and Gaza Strip are occupied territories has been much questioned beyond the factual tests discussed above. Israel and the international community have both expressed a position on the issue. Therefore, there follow two separate sections. Firstly Israel's stance regarding the determination of the territories as belligerently occupied will be examined and then the response of the international community will be considered. After this it will be possible to reach a conclusion regarding their status as occupied territories.

1.3.1 : Israel's stance

Israel has consistently denied the applicability of the Geneva Conventions and the Hague Regulations to the West Bank and Gaza Strip. Israel is not a party to the Hague Convention to which the relevant regulations are annexed, however she is a party to Geneva Convention IV.[56] Nonetheless, Israel contends that the Geneva Convention does not apply to her occupation of the West Bank or Gaza Strip.

This is based upon Article 2 of Geneva Convention IV which provides,

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Power, even if the said occupation meets with no armed resistance."

It is Israel's submission that the West Bank was not part of the territory of Jordan and the Gaza Strip was not part of the territory of Egypt at the time of the 1967 war.[57]

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[55] Article XIII (2) (a), Interim Agreement.
[56] Israel signed the Geneva Conventions on 8 December 1949 and ratified them on 6 July 1951.
[57] The Israeli spokesman to the United Nations, Moshe Dayan stated that position to the General Assembly on 10th October 1977 – A/32/pv 27 October 1977. In 1979 Professor Yehuda Blum restated before the Security Council that Israel has taken and continues to take this stance in relation to Geneva Convention IV – Security Council Official Records (XXXIV) 2131st meeting 19 March 1979. Israel has

Therefore, if neither piece of land was part of the territory of a *"High Contracting Power"* (as provided for in Article 2 (2) above) then Geneva Convention IV is not applicable to the situation.[58] Indeed, Israeli supporters have argued that were Israel to accept the applicability of Geneva Convention IV to the territories it would amount to a *de facto* recognition of Jordanian and Egyptian sovereignty over the lands.[59]

The situation is thus slightly different depending on whether the West Bank or Gaza Strip is being considered. The basis of the Israeli denial of the applicability of Geneva Convention IV in relation to the West Bank stems from the claim that the West Bank was never part of the territory of Jordan. If this is correct it means that the original Jordanian claim to be the ousted legitimate sovereign in the West Bank by virtue of its succession to the rights of Palestinian Arabs living in the West Bank cannot be valid.[60] However, the Jordanian view has been rejected on legal grounds.[61] This discussion is somewhat academic nonetheless because since that time Jordan has renounced its claim to sovereignty over the West Bank.[62]

Chaim Herzog (former Israeli President) has stated in a speech to the General Assembly that as Jordan was never a "legitimate sovereign" in the West Bank the Conventions do not apply because Israel is not an occupying power since that term is intended for use in relation to short term occupation and is not relevant in this situation.[63]

The Gaza Strip, is also contended by Israel not to come within the scope of the application of Geneva Convention IV because it was not part of the territory of one the

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also officially stated this position to the International Committee of the Red Cross: cited in Bar-Yaacov, "The Applicability of the Laws of War to Judea and Samaria and to the Gaza Strip" (1990) *Is. LR* 485. See also O'Brien, *Law and Morality in Israel's War with the PLO* (1991) (New York: Routledge), at 228. The best description of the Israeli view is still found in Shamgar, "The Observance of International Law in the Israeli Administered Territories" (1971) 1 *Is. YHR* 262.

[58] This approach is also adopted by some Israeli writers. See, Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (1968) 3 *Is. LR* 279.

[59] See Meir Shamgar's viewpoint as described in O'Brien, *Law and Morality in Israel's War with the PLO*, at 228.

[60] See Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank" (1973) 14 *HILJ* 1, at 22 – 38

[61] Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press) (1993), at 108 regarding the Arab League's censuring of Jordan. See also, Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", at 289 – 293.

[62] On July 31 1988 King Hussein of Jordan made a declaration that Jordan accepted the wishes of the Palestinian people to secede – (1988) 28 *ILM* 1637.

[63] A/32/pv 47, 26 October 1977. See also Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank", at 9. See section 2.2.1 below on situations of prolonged occupation.

High Contracting Parties to the Convention.[64] However, the Gazan situation is slightly different from that of the West Bank since Egypt has only ever acted as a *de facto* administrator in the Strip, rather than as a sovereign power, (Egypt administered the Gaza Strip between 1948 – 1956 and then after the 1956 war again between 1957 - 1967). Since the March 1979 Egyptian/Israeli peace agreement the belligerency between Israel and Egypt has formally ceased.

Whilst the technical logic to this argument is clear and despite the Israeli agreement with Egypt and the Jordanian renunciation in sovereignty it is possible for those opposed to the Israeli stance to rebutt them. This is because it can be submitted that a state of belligerency still exists, even if in slightly different circumstances. The belligerency could be argued as being between the Palestinian people living in the West Bank and the Gaza Strip and the Israelis, rather than between states.[65] Proponents of this theory would say that until the peace process is completed the argument exists that the laws of belligerent occupation should apply as a matter of course to both territories.

Israel does agree however, to apply *de facto* the *humanitarian* provisions of Geneva Convention IV to both the West Bank and Gaza Strip.[66] Nonetheless, as Roberts points out, this is a dubious alternative, since it is not clear which provisions Israel defines as *humanitarian* and furthermore this interpretation of the situation potentially allows Israel the possibility of abrogating or unilaterally interpreting parts of the Convention.[67]

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[64] see Labes, "The Law of Belligerent Occupation and the Legal Status of the Gaza Strip" (1988) 9 *Mich. JIL* 385.

[65] The fact that although this situation is not a state of belligerency as between states is important because it also affects the question of whether the Palestinian situation is an internal or international armed conflict. It is submitted that without doubt the Palestinian situation is an international armed conflict. Therefore potentially Additional Protocol I to the Geneva Conventions applies as the Palestinians in the West Bank and Gaza Strip, as discussed in Chapter Two, can be considered to be in an "...armed conflict[s] in which people area fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination..." (Article 1 (4)). However Israel has not signed Additional Protocol I and its status as customary international law is shaky, partly because of the lack of significant practice by non-parties (Meron, "The Geneva Conventions as Customary Law" ,at 350). Therefore, these issues will not be further discussed here since there is dubious support for their applicability.

[66] Roberts, "Prolonged Military Occupation" (1990) 84 *AJIL* 46, at 65. Shamgar notes that "*de facto* observance of rules does not necessarily mean their applicability by force of law" – Shamgar, "The Observance of International law in the Administered Territories", at 262. For discussion of how Israel applied the Convention *de facto* to the West Bank and Gaza Strip see, Benvenisti, *The International Law of Occupation*, at 114 – 123.

[67] Roberts, "Prolonged Military Occupation", at 65 – 66. Gasser also supports the theory that the Geneva Conventions are applicable to the West Bank and Gaza Strip, see Gasser, "The Geneva Conventions and the Autonomous Territories in the Middle East" chapter 10 from Bowen (Ed.) *Human Rights, Self Determination and Political Change in the Occupied Palestinian Territories* (The Hague/Boston/London: Martinus Nijhoff Publishers) (1997) 291.

The Israeli contention has also been criticised both by the international community (which will be considered below) and academics, including Israeli writers.[68]

Israel also takes a similar stance on the applicability of the Hague Regulations in the West Bank and Gaza Strip.[69] The Hague Regulations are generally thought of as declaratory of customary international law. Indeed the Israel Supreme Court has accepted that their status is reflective of customary international law on the issue.[70] The Israeli Supreme Court, sitting as High Court with jurisdiction over the West Bank and Gaza Strip has held however, that the Hague Regulations are applicable *de jure* to the territories, which contradicts traditional Israeli governmental thinking.[71]

The closest the Israeli Supreme Court in its own capacity has got to declaring the applicability of the Geneva Conventions to the West Bank and Gaza Strip was in 1988.[72] The customary law test of effective control was used to decide whether the laws of occupation applied to the West Bank and Gaza Strip. It was held that the laws of occupation did apply because Israel was still in control of the territories. Benvenisti notes that this,

"...questioned the Government's claim...for if in customary law what matters is effective control, and the legal status of the territory is never relevant, why did it become so important in the eyes of the drafters of

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[68] For example, Dinstein, "The International Law Of Belligerent Occupation and Human Rights", at 106 – 108 and Roberts, "Prolonged Military Occupation", at 65 – 66 and footnote 72. Alternative options for the classification of the Israeli occupation of the West Bank and Gaza Strip, rather than as belligerent occupancy have been attempted. Gerson suggests that Israel's status in the West Bank is that of trustee-occupant, see Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank". Roberts rebuts this however, on the grounds that 1) the classification of the situation as a belligerent occupancy and therefore it coming within the scope of the Geneva Conventions does not necessarily have to be too narrow to incorporate Israeli occupation of the West Bank, 2) the idea of "trusteeship" is automatically implicit in all forms of occupation and 3) whether the State of Israel is an appropriate trustee for Palestinian interests – see Roberts "Prolonged Military Occupation", at 68 – 69.

[69] See Bar-Yaacov, "The Applicability of the Laws of War to Judea and Samaria and to the Gaza Strip", at 486. See also Shamgar, "The Observance of International Law in the Administered Territories".

[70] A Teachers' Housing Co-operative Society v the Military Commander of the Judea and Samaria Region et al. *HC* 393/82 (see (1984) 14 *Is. YHR* 301). Under Israeli law customary international law is automatically incorporated into national law, whereas treaty law is not unless it is incorporated by an Act of the Knesset – see Benvenisti, *The International Law of Occupation*, at 118 – 119.

[71] For example see Arnon et al v Attorney-General et al *HC* 507/72 (see (1979) 9 *Is. YHR* 334, at 336) and The Elon Moreh Case et al *HC* 507/72 (see (1979) 9 *Is. YHR* 345, at 348) – both cited in Scobbie, "Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty" chapter 9 from Bowen (Ed.) *Human Rights, Self Determination and Political Change in the Occupied Palestinian Territories* 221. For a discussion of High Court cases relevant to international law in general see Qupty, "The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel" Chapter 2 from Playfair, *International Law and the Administration of Occupied Territories* 87.

[72] Affu v Commander of the IDF Forces in the West Bank (1988) 42 (2) Piskei Din (Judgments of the Israeli Supreme Court) 4, at 49, translated in (1990) 29 *ILM* 139 and cited in Benvenisti, *The International Law of Occupation*, at 111.

the Fourth Geneva Convention, who decided, per the Israeli government's argument, to qualify its applicability?"[73]

All of the above show that Israel is technically in a "little-noted logical muddle on the applicability of the Hague and Geneva Conventions".[74] There has been an emphasis placed upon the importance of the status of belligerency, but since this has formally ended as between Israel and both Egypt and Jordan no such situation officially exists. Roberts notes that,

"...Israel itself, when it chooses, is prepared to depart from its own strict legal logic about the circumstances in which the relevant rules and conventions are applicable."[75]

It seems that despite the Israeli position, if the Geneva Conventions are considered to be customary international law as well as the Hague Regulations, then Israel is nonetheless bound at an international level, if not a national level, to apply the Geneva Convention *de jure*.[76]

Following the DOP the question could arise as to whether Israel can still be considered to occupy the West Bank and Gaza Strip due to the powers taken on by the PA. However, since there has been no formal agreement of statehood and therefore no transfer of sovereignty to Palestine, it seems that there must also still be a state of occupation, albeit a unique and unusual one.[77] The belligerency exists between the Palestinian people and the state of Israel. The creation of the PA is a temporary regime which awaits the outcome of final status negotiations. It is submitted therefore, that it is still possible to classify the West Bank and Gaza Strip as occupied territories *sui generis*. Furthermore, as will be seen below, the international community is still of the opinion that the Geneva Conventions should apply post DOP, hence the United Nations Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, which took place on 15 July 1999.

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[73] Benvenisti, *ibid.*
[74] Roberts, "Prolonged Military Occupation" (1990), at 65.
[75] *Ibid.*
[76] Roberts states that the high number of state parties to the Geneva Convention is one of the reasons that it may be considered to be declaratory of customary international law – see *ibid.*, at 53.
[77] See Scobbie, "Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty". Other writers have suggested however, that post DOP the West Bank and Gaza Strip are difficult to fit into existing categories of international law such as belligerent occupation because of their *sui generis* nature. This then raises the question of by what international yardstick we should judge Israeli activities in the territories – see for example, Gasser, "The Geneva Conventions and the Autonomous Territories in the Middle East".

1.3.2 : International Community's stance

The international community has repeatedly rejected Israel's claims that Geneva Convention IV does not apply to the West Bank and Gaza Strip.[78] The Israeli argument, as explained above, regarding Geneva Convention IV, has been wholly rejected by the International Committee of the Red Cross and state parties to the Geneva Conventions.[79]

The UN General Assembly has regularly maintained that the Geneva Conventions apply to the West Bank and Gaza Strip from the beginning of their occupation after the 1967 war.[80] As has the Security Council.[81] Even the United States of America, which has often been a political ally of Israel, has stated that Geneva Convention IV is applicable to the West Bank and Gaza Strip.[82]

Indeed, at the United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, it was stated in the Final Document that,

"The participants reaffirmed the existing international consensus on the de jure applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including Jerusalem, in accordance with relevant General Assembly and Security Council resolutions. They also called upon Israel, the occupying Power, to comply fully with the provisions of the Convention. Furthermore, the participants recalled that

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[78] See for example General Assembly Resolution 58 Part B (XLIII), 6 September 1988 and the International Committee of the Red Cross Annual Report 1987, at 83.

[79] See Boyd, "The Applicability of International Law to the Occupied Territories" (1971) 1 *Is. YHR* 258. The EU has also dismissed the Israeli arguments as being "without merit" - *UKMIL* (1988) 59 *BYBIL* 574.

[80] The first resolution to attempt to urge respect for the Conventions in the territory was General Assembly Resolution 2232 (XXII), July 4 1967 (Voting: 116:0:2). Then in 1968 came the first Resolution to request Israel's explicit compliance with both the Geneva Conventions and the 1948 Universal Declaration of Human Rights – General Assembly Resolution 2443 (XXIII), December 19 1968 (Voting: 60.22.37). The Security Council has also been critical of the Israeli stance on the Geneva Conventions – see for example Security Council Resolution 607, January 5 1988, in which the applicability of the Conventions to the territories was unanimously reaffirmed. See the discussion of the pattern of voting at the UN on this issue in Roberts, "Prolonged Military Occupation", at 69 – 70.

[81] See for example Security Council Resolution 904, 18 March 1994 which states that affirms "...the applicability of the 4th Geneva Convention of 12 August 1949...to the territories occupied by Israel in June 1967, including Jerusalem, and the Israeli responsibilities thereunder...". Adopted as a whole without a vote at the 3351st meeting.

[82] See statement by Ambassador Scranton - *Digest of United States Practice* (1976) 710. See also U.S. Department of State, Country Reports on Human Rights Practices for 1987, 100th Congress, 2nd Session (1988) 1189: "The United States recognises Israel as an occupying power in all of these territories and therefore considers Israeli administration to be subject to the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention concerning the protection of civilian populations under military occupation.", also cited in Roberts, "Prolonged Military Occupation", at 69.

the Fourth Geneva Convention, as an instrument of international humanitarian law, was applicable, regardless of the national legislation of Israel, which is a High Contracting Party to the Convention."[83]

It is clear that whatever the stance taken regarding the occupation of the West Bank and Gaza Strip, and the applicability of the Geneva and Hague law, the Palestinian situation is an extremely difficult and detailed to analyse:

"There is no doubt that this military occupation, qua military occupation, has been exceptional and unique, and in its relation to international law confusingly complex."[84]

1.4: Conclusions for this section

In the first part of this chapter a number of issues have been raised which are important in terms of the protection of human rights, both for the people of the West Bank and Gaza Strip and for international law.

First, we have been reminded that human rights abuses are continuing to be perpetrated against the Palestinians of the West Bank and Gaza Strip by both Israel and the PA. Second, given the setting of variable personality against which these abuses are occurring, the question as to how these abuses can be addressed – through the international legal mechanisms of human rights law or international humanitarian law – has also been raised. This question has meant that the issue of whether international humanitarian law applies to the territories has been examined which leads to the third conclusion. Third, it has been concluded that the situation of occupation in the West Bank and Gaza Strip is a situation *sui generis*.

As a result of the situation *sui generis* in Palestine the traditional debate as to the protection of human rights in situations of occupation where an entity with variable personality exists therefore needs rethinking. It is not surprising that international law fails to take account of variable personality as it does not recognise the existence of the theory of variable personality. However, by attempting to raise such questions in the light of variable personality it is possible that the problems could be solved.

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[83] Final Document paragraph 5. Cairo, 14 and 15 June 1999. 98 Governments took part in the meeting.
[84] Best, *War and Law Since 1945* (Oxford: Oxford University Press) (1984), at 315.

It is submitted that this third point makes the question as to whether human rights law or international humanitarian law should be used to protect human rights in that context all the more complicated. The following section aims to examine these complications and looks at how human rights protection is currently implemented in the West Bank and Gaza Strip, given its situation of occupancy *sui generis* and the variable nature of status of the PA. By examining what happens now in the West Bank and Gaza Strip in relation to human rights – a system of protection that given the facts above is clearly operating badly - it will be possible to consider how it could be changed for the better. This discussion should assist in questioning how international law can protect human rights in situations of variable personality, by attempting to address the human rights issue in the light of the changing international scene.

2: WHAT DOES HAVING A SITUATION OF BELLIGERENT OCCUPATION SUI GENERIS WHERE VARIABLE PERSONALITY EXISTS MEAN FOR THE PROTECTION OF HUMAN RIGHTS?

So, now it has been decided that the West Bank and Gaza Strip are in a situation of occupancy, albeit a unique example, it should be examined how human rights are currently protected there. This will lay the groundwork for a discussion to take place about how these systems can be improved.

2.1: How are human rights currently protected by international human rights law in the West Bank and Gaza Strip?

This issue will be split into three sections. The first will examine how international human rights law is applied by Israel and to Israel and the second will examine the same issue as applied by the Palestinian Authorities and to the Palestinian Authorities. The third will consider how the United Nations Commission and Sub-Commission on Human Rights have approached the issue of the protection of human rights in the West Bank and Gaza Strip.

2.1.1: Israel

Israel is a party to the International Covenant on Civil and Political Rights (ICCPR).[85] The question to be considered here is whether the rights laid down in the Covenant are

[85] Israel signed the ICCPR on 19 December 1966: *UKTS* 6 (1977); 999 *UNTS* 171. Receipt of the instrument of ratification was on 3 October 1991 and it entered into force on 3 January 1992. However since Israel has not ratified Protocol I, individual victims of human rights abuse are unable to petition the Human Rights Committee. Israel is also a party to the International Covenant on Economic Social and Cultural Rights 1966, *UKTS* 6 (1977); 993 *UNTS* 3, (ICESCR) which came into force in 1976. She signed the ICESCR on 19 December 1966, receipt of the instrument of ratification was on 3 October 1991 and it entered into force for Israel on 3 January 1992. There are conventions regarding human rights that Israel has not signed. For example, Israel is not a party to *The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (1990). As Palestine is not as yet a sovereign state it is party to none of these.
The ICCPR came into force in 1976. For a general discussion see Joseph, Schultz and Castan, *The ICCPR: Cases, Materials and Commentary* (Oxford: Oxford University Press) (2000); Alston, *The*

applicable to the population of the West Bank and Gaza Strip. However, the Israeli government has generally not been keen to suggest that they are applicable to the West Bank and Gaza Strip, thereby denying international legal responsibility for breaches of human rights they perpetrate within those areas. For example, Roberts cites the occasion when in a memo from the Office of the Legal Adviser in the Israeli Foreign Ministry in 1984, the government states in relation to the Universal Declaration of Human Rights (UNDHR)[86], the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

> "The unique political circumstances, as well as the emotional realities present in the areas concerned, which came under Israeli administration during the armed conflict in 1967, render the situation sui generis, and as such, clearly not a classical situation in which the normal components of 'human rights law' may be applied, as are applied in any standard, democratic system in the relationship between the 'citizen' and his government. Hence the criteria applied in the areas administered by Israel, in view of the sui generis situation, are those of 'humanitarian law', which balances the needs of humanity with the requirements of international law to administer the area whilst maintaining public order, safety and security."[87]

As to whether this position is legally tenable, it is instructive to turn to Article 2(1) of the 1966 Covenant, which provides that:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"

The relevant phrase from Article 2(1) of the ICCPR which can assist in answering the question posed above, is clearly, "within its territory and subject to its jurisdiction". The questions which then follows on is what exactly this phrase means. Buergenthal clearly states that:

United Nations and Human Rights: A Critical Appraisal (Oxford; Clarendon Press) (1992); Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein/Strasbourg/Arlington: Engel) (1993); Henkin (Ed.), *The International Bill of Rights* (New York: Columbia University Press) (1981); McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press) (1990) and Alston and Crawford, *Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) (2000).

[86] General Assembly Resolution 217A (III), (1948), UN Doc. A/810 (1948). Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Ukrainian Soviet Socialist Republic, Yugoslavia and Saudi Arabia abstained. See also Kunz, "The United Nations Declaration on Human Rights" (1949) 43 *AJIL* 316 and Schwelb, "The Influence of the UNDHR on International and National Law" (1959) *Proc. ASIL* 217. Reisman states that the UNDHR is declaratory of customary international law – Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *AJIL* 866, at 867 – 868.

[87] Office of the Legal Adviser, memorandum (September 12 1984), *written for and contained in,* Roberts, Joergensen and Newman, *Academic Freedom Under Israeli Military Occupation* (World University Service, London/International Commission of Jurists, Geneva, 1984) 80, 81 cited in Roberts, "Prolonged Military Occupation", at 72 and footnote 98.

"A State party to the Covenant which maintains actual civil or military control over a given territory is under an obligation to ensure in that territory the rights the covenant guarantees, irrespective of whether it has formally annexed the territory or has a legal right to occupy or control it."[88]

This interpretation means that certainly up until the DOP and the hand over of some areas within the West Bank and Gaza Strip to the PA that Palestinians living within the occupied territories were afforded the human rights protection of the ICCPR as a result of the Israeli occupation.

The next issue which naturally emerges in the Palestinian context is the extent to which Israel can *currently* be said to "maintain actual civil or military control" over the West Bank and Gaza Strip? It has been generally accepted that this equates to the test of effective control.[89]

As was discussed in the previous chapter and section 1 of this chapter, there are parts of the West Bank and Gaza Strip which Israel no longer occupies in the traditional sense - in that it no longer has effective control over civil life in areas which have been taken over the Palestinian Authority.[90] It is possible to submit the argument that in the areas which have not yet been handed over to the PA and are still effectively under Israeli administration that the ICCPR is applicable. However, this does not answer the main question regarding those areas which have been handed over to the PA since they cover the majority of the large densely populated areas of the West Bank and Gaza Strip.

It is instructive to turn to the proceedings and comments of the Human Rights Committee in order to see what their practice regarding continuity of protection is in areas where the administering power has changed or boundaries have been altered.

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[88] Buergenthal, "To respect and to ensure; State Obligations and Permissible Derogations" chapter 3 from Henkin (Ed.), *The International Bill of Rights* 72, at 77. See also Nowak, *U.N. Covenant on Civil and Political Rights*, at 41 - 42 and Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories" (1992) 26 *Is. LR* 24, at 27 - 28. See also the European Convention on Human Rights Practice on this issue- Lozidou v Turkey (1995) Series A No. 310.

[89] Benvenisti, "Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements" (1994) 28 *Is. LR* 297, at 309. However, it should also be briefly noted that in some recent State practice it seems that new states have stated that they consider themselves to be legally responsible for areas of territory on which they have factual and effective control as well as other areas within their territory over which they do not exercise that degree of control - for example see the statement regarding Bosnia-Herzegovina in para. 329 of the Report of the Human Rights Committee, 7 October 1993 UN Doc., A/48/40. However this stance was likely to have been taken for political reasons as Bosnia - Herzegovina clearly wanted to establish full effective control throughout the territory to which it purported to have title, whether or not it fulfilled the effective control test at the time. Note also the impact of the General Comment of the Human Rights Committee No. 26, 8 December 1997, which is discussed below.

[90] See Chapter Four regarding state responsibility.

2.1.1.1: Human Rights Committee Practice

The Committee has consistently maintained that Israel must apply the Covenant in the areas it occupies, despite Israel's denial of this.[91] However, the Committee has also clearly noted the issue with regard to the lack of protection afforded to those Palestinians in areas controlled by the PA, since it notes that "...the Covenant must be held applicable to the occupied territories...where Israel exercises effective control."[92]

This therefore leaves a gap in protection as far as those Palestinians are concerned. Problematically, for the rights of the Palestinians under PA control and in the light of previous statements regarding continuity of rights by the Committee, which are examined below, the Committee does not appear to consider how the issue of the gap in protection can be addressed.

On previous occasions the Committee has stated that rights once given cannot be taken away and it has applied a doctrine of continuity of rights even if the government or administration of a territory are changed.

In 1997 the Committee issued a general comment which dealt specifically with this issue.[93] Paragraph 4 states that:

> "The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant."

This attitude has also been demonstrated in the recent practice of the Committee with regard to the way in which it has responded to the situations in the Former Yugoslavia and Hong Kong.[94]

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[91] Concluding Observations of the Human Rights Committee: Israel. 18 August 1998 CCPR/C/79/Add. 93 para. 10. For discussion re: the applicability of multilateral conventions to occupied territories see, Meron, "Applicability of Multilateral Conventions to Occupied Territories" (1978) 72 *AJIL* 542.
[92] Concluding Observations of the Human Rights Committee: Israel, *ibid.*
[93] Continuity of Obligations, General Comment No. 26, 61st Session 8 December 1997.
[94] The Human Rights Committee has also adopted this approach in cases of state succession. See, for example Kamminga, "State Succession in Respect of Human Rights Treaties" (1996) 7(4) *EJIL* 1. The descriptions of the Committee's response to the situations in Armenia, Georgia, Kazakhstan, Kyrgyzstan,

When considering the Former Yugoslavia the Committee emphasised the entitlement of the peoples within the territory of the former Yugoslavia to the guarantees of the Covenant in relation to the succession of each new State.[95]

Regarding the handing back of Hong Kong to the State of China by the United Kingdom the Committee recalled that,

> "...In dealing with cases of dismemberment of States parties to the International Covenant on Civil and Political Rights, it had taken the view that human rights treaties devolve with territory and that States continue to be bound by the obligations under the Covenant entered into by the predecessor State. Once the people living in a territory enjoy the protection of the rights under the International Covenant on Civil and Political Rights, such protection cannot be denied to them merely by virtue of dismemberment of that territory or its coming under the sovereignty of another State or of more than one State."[96]

China has now signed[97] (but not yet ratified) the ICCPR and now reports for the Hong Kong Special Administrative Region.[98] Although China is not therefore a full state party to the Convention it was willing to accept that the rights of the population of Hong Kong must be reflected in its practice. This practice supporting the statements of the Committee must surely add to their strength.

In the Palestinian context it appears that this practice is not adhered to given Israel's unwillingness to apply the ICCPR and the fact that as Palestine is not a state it is unable to become a party to the covenants.

Although the main treaty being considered here is the ICCPR it is also instructive to consider the practice of other treaty bodies in relation to Israel in order to see if they are consistent with the approach adopted by this committee. To this end the other main bodies will be considered in turn.

Tajikistan, Macedonia, Turkmenistan and Uzbekistan, which it stated were bound by the obligations of the Covenant from the dates when they became independent.

[95] See for example para. 333 re: Croatia, and para. 363 re: Federal Republic of Yugoslavia (Serbia and Montenegro), Report of the Human Rights Committee 7 October 1993, UN Doc. A/48/40.

[96] Report of the Human Rights Committee Vol. 1 21 September 1997, UN Doc. A/52/40, para. 81.

[97] China signed on 5 October 1998. It should be noted that sovereignty over Hong Kong was given to China by the United Kingdom on 1 July 1997.

2.1.1.2: The Committee on Economic Social and Cultural Rights

The Committee was established by ECOSOC resolution 1985/17 and Israel ratified the Convention on Economic Social and Cultural Rights on 3 October 1991. The last Israeli report was considered at its 26th Session from 13 – 31st August 2001. In its concluding observations the Committee stated in paragraph 11 that it deplored

"...the State party's refusal to report on the occupied territories..."[99]

This shows that Committee considered Israel to be the occupying power and that as a result it should report for all areas within its jurisdiction. The Committee therefore ignored the issue of effective control and the question of those areas where the PA could be said to exercise some degree of power.

In the Committee's concluding observations to the previous Israel report in 1998 the Committee did take the view that,

"...the State's obligation under the Covenant apply to all territories and populations under its effective control. The Committee therefore regrets that the State party was not prepared to provide adequate information in relation to the occupied territories."[100]

This Committee's approach is therefore similar to that of the Human Rights Committee. It noted that effective control was an issue at play, however it failed to consider that the PA may have control in some Palestinian areas. It resolved therefore that Israel, as occupying power, was the entity under whose jurisdiction the rights of Palestinians in the West Bank and Gaza Strip should be considered to be.

2.1.1.3: Committee Against Torture

The Committee Against Torture was established pursuant to Article 17 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and Israel ratified the Convention on 3 October 1991. The

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[98] See CCPR/C/HKSAR/99/1, 16 June 1999.
[99] E/C.12/1/Add. 69, 31 August 2001.
[100] C/C.12/1/Add. 27, 4 December 1998, para. 8.

Committee is due to consider the latest Israeli report at its 27th Session on November 2001.

It last considered an Israeli report in 1998 at its 20th Session. In its concluding observations the Committee did not address the issue of effective control or the question of whether Israel should report for the occupied territories. The conclusions did express concern regarding the Israeli interrogation methods used towards arrested Palestinians and requested such action to be ceased.[101] However, its lack of comment suggests that it shut its eyes to the question of who should be reporting on behalf of the Palestinians in the West Bank and Gaza Strip.

2.1.1.4: Committee on Elimination of Racial Discrimination

The Committee was established pursuant to Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 and Israel ratified the Convention on 3 January 1979.

The Committee last considered an Israel report in 1998. In its concluding observations the Committee generally refers to "Israel and the occupied Palestinian territory". In paragraph 6 it did refer to the PA, however it failed to consider the implications of its creation for the protection of human rights:

"It takes note of the establishment of the Palestinian Authority which has certain responsibilities in parts of the occupied Palestinian territories."[102]

The Committee then goes on to state in paragraph 12 that it,

"... reiterates its opinion of 1991 that the report of Israel should encompass the entire population under the jurisdiction of the government of Israel...Israel is accountable for the implementation of the Convention, including reporting obligations, in all areas over which it exercises effective control."[103]

Therefore, like the other Committees, the lack of examination of the implications of the creation of the PA mean that PA human rights abuses are not properly addressed and the

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[101] A/53/44, para. 240 (a).
[102] CERD/C/304/Add.45, 30 March 1998, para. 6.
[103] *Ibid.*, at para. 12.

question of Israel's ability to protect human rights in areas under PA effective control are not sufficiently well considered.

2.1.1.5: Committee on the Elimination of Discrimination Against Women

The Committee was established pursuant to Article 17 of the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and Israel ratified it on 3 October 1991.

The Committee last considered an Israeli report in its 17th Session in July 1997. There was very little reference to the position of Israel and its reporting obligation since the creation of the PA. However, in its concluding observations the Committee recommended that,

"...the Government of Israel should ensure that the Convention was implemented throughout the territory under its jurisdiction."[104]

The Committee thereby side-stepped the question of effective control and the potential gap created for the protection of Palestinian's human rights in the areas controlled by the PA.

2.1.1.6: Committee on the Rights of Child

The Committee for the Rights of the Child was established pursuant to Article 43 of the Convention on the Rights of Child 1989 which Israel ratified on 3 October 1991.

The Committee has not considered a report from Israel since the creation of the PA since its second periodic report is overdue and she submitted her first report late. The report was due in 1993 and was not submitted until February 2001. The Committee will consider the report at its session next year. It will be surprising however if the Committee take a different stance to that of the other Committees considered above.

As discussed above in relation to the other Committees, the approach of the treaty bodies fails to take into account the reality of the question of effective control of

[104] A/52/38/rev. 1/part II , para. 170.

territory. Whilst this means that Israel must continue to report for all within the occupied territories, it does not take account of the practicalities of doing so, or the issue of abuse on the part of the PA.

Now that the situation has been considered in relation to Israel, this study turns to examine how, if at all, international human rights provisions are applied to and by Palestine.

2.1.2: Palestine.

The issue in terms of the international protection of human rights of the Palestinian population of the West Bank and Gaza Strip is particularly difficult due to the fact that as yet Palestine is not a full State in international law. This is despite the fact that as was discussed in Chapter Three Palestine is sometimes treated as a state in some circumstances by some other entities. As a result of this lack of official statehood it is unable to become a high contracting party to any international human rights treaty - such as the ICCPR.[105]

Traditionally Israel, as the occupying power, would usually be the State which would apply the human rights treaty within the occupied areas. However, in the areas controlled by the PA it is unclear who should be applying which standards and how they should do this, since arguably Israel is not in effective control of public life within those regions. These are all important issues in terms of this overall thesis since the conclusions reached are necessary to help determine whether the theory of variable personality is compatible with the current systems of international human rights protection.

There is, sadly very little information to note within this section because of the unbalanced way in which international human rights structures approach the issue of rights protection. It is true to say that in the majority of situations the entity against

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[105] Article 48(1) of the ICCPR provides that, "The present Convention is open for signature by any State member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant. See also article 3 of the *Vienna Convention on the Law of Treaties*, UN Doc. A/Conf. 39/28, *UKTS* 58 (1980), which draws a

which a citizen's human rights need to be protected is the state, and indeed international human rights law acknowledges and attempts to cover such situations, albeit with lack of enforcement mechanisms. However, it does not deal at all well with the scenario where the entity infringing the human rights of a people is not a state and has a variable level of personality depending upon the context it is operating within at any one time. This is particularly unacceptable given that at the moment when rights are infringed (for example, freedom of speech or unfair treatment of detainees – examples which were given of PA action against Palestinian human rights in section 1.1 above) the entity with variable personality is taking on the role of state and acting in an official capacity.

Therefore other than through the media, NGOs, or academic writing, there is almost no attempt to place pressure on the PA to comply with human rights standards. International law itself does not provide any remedy or lay down regulations which should be adhered to by the Palestinian Authorities in the period before full statehood is achieved.

This is interesting and important given that as was discussed in Chapter One there is sometimes importance placed on human rights standards in recognition decisions. Since human rights records can be important in terms of achieving recognition, recognition for Palestine could be said to be trapped in a vicious circle. If Palestine was seen to be more "human rights friendly" then it might be more likely to be recognised. However until it is a state, unless international law makes changes to incorporate non-state entities into its human rights mechanisms, Palestinian authorities are not in the position to positively demonstrate an improvement in human rights under the same schemes under which those who are able to chose to recognise it are governed.[106]

Overall it can be said with certainty that in the Palestinian context international human rights structures are not being complied with by either Palestine or Israel. The Palestinian population of the West Bank and Gaza Strip do not have protection which they are entitled to due to the effective control the PA has without any international safeguards to place a check on its actions.

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distinction between those treaties concluded between States and those concluded between States and other subjects of international law.

[106] This is an extremely important issue and will be returned to later in this chapter in section 3.

The international community through its recognition and encouragement of the PA has helped to create a non-state entity with significant powers which are hard to pin-down due to the variable and the non-static nature of its personality. However this development has occurred without sufficient thought as to the creature which has emerged. The international law which governs the protection of human rights clearly does not reflect the reality that an entity with a variable personality exists, for international human rights law weights responsibility for human rights protection significantly towards states.

International law is sufficiently flexible in its application in that it allows such an entity to emerge, which is good as it means that the right to self determination is slowly fulfilled. However, other areas of international law, such as the protection of human rights do not envisage a situation, such as the Palestinian one, where the sovereignty is slowly passing and a state-like entity emerges which has no powers to sign and ratify the human rights treaties, due to its lack of full statehood.

The international community has permitted this variable personality to emerge due to its failure to reach consensus about the status of Palestine and the Palestinian representatives. Since human rights protection aims to uphold the human rights of all peoples it appears that as a result of the variable personality of the PLO and the PA, Palestinians within the West Bank and Gaza Strip are missing out on the international systems of protection which if they were still controlled fully by Israel, or if Palestinian statehood had already been achieved they would be protected by.

It seems therefore that the human rights law mechanisms which are considered above do not adequately deal with a situation of variable personality when occurring in a situation of occupancy like that which exists in the West Bank and Gaza Strip. It is interesting to consider whether the political organs of the United Nations which deal with human rights have faired any better in considering protection for those in the territories. The study now turns therefore to examine the practice of the Commission and Sub-Commission for Human Rights.

2.1.3: The practice of the United Nations Human Rights Commission and Sub-Commission on the Promotion and Protection of Human Rights[107]

The Commission has 53 member states which are drawn from the different political blocs within the organisation. [108] The Commission's work has three main prongs – enforcement, promotional activities and standard setting.[109] The enforcement work of the Commission has occurred mostly through the establishment of procedures through which it can investigate allegations of human rights violations by individual states.[110] Usually a working group or a special rapporteur is appointed to consider the allegations against the state and make a public report which is then discussed at public Commission meetings.

The Commission has recently had a special session relating the Grave and Massive Violations of the Human Rights of the Palestinian people from 17 – 19 October 2001.[111] The session can no doubt be considered to be a good thing in terms of the awareness of human rights violations in the area it created and the attention which was drawn to the issues raised. However, as its title suggests, it related primarily to Israeli rather than PA human rights abuses. In its resolution at the session the Commission referred to Israel as the "occupying power" and called upon Israel to "...abide scrupulously by its legal obligations and responsibilities under Geneva Convention IV".[112] Like the human rights treaty bodies discussed above the Commission did not fully consider the implications of the creation of the PA or the intricacies of the question of effective control.

At the Special Session discussed above the Commission also heard from the Special Rapporteur, Mr. G. Giacomelli. His contribution was entitled "Mission Report on Israel's violations of human rights in the Palestinian territories occupied since 1967".

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[107] The name of the sub-commission was changed from 'Sub-commission on Prevention of Discrimination and Protection of Minorities' on 27 July 1999 by a decision of ECOSOC.
[108] Established by ECOSOC under Article 68 of the UN Charter. ECOSOC was set up by Chapter X of the UN Charter and has 54 members. (Article 61(1) aims to implement the human rights standards laid down in Article 1 and 55 of the Charter).
[109] See Humphrey, *Human Rights and the United Nations* (Dobbs Ferry, New York: Transnational Publishers) (1984); Meron, *Human Rights Lawmaking in the United Nations* (Oxford; Clarendon Press) (1986); McDougal and Bebr, "Human Rights in the United Nations" (1964) 58(3) *AJIL* 603 and Alston, *The United Nations and Human Rights: A Critical Appraisal.*
[110] ECOSOC Resolution 1235 gave the Commission this power when it authorised the examination of information relevant to "gross violations of human rights" and to study situations where there had been a "consistent pattern" of human rights violations.
[111] E/CN.4/S – 5/5 and E2000/112.

In the report Mr. Giacomelli refers to Israel as the occupying power and he reaffirms the obligation upon Israel to apply international humanitarian law *de jure* within the West Bank and Gaza Strip. Since the Report and indeed the whole special session related particularly to Israeli human rights abuses this is perhaps not surprising, however it does mean that there is a failure to consider the human rights abuse perpetrated by the PA.

The Commission has also considered human rights violations at its regular session and last did so earlier this year at its 57th Session. The Commission adopted a Resolution entitled, "Question of the violation of human rights in the occupied Arab territories, including Palestine".[113] The resolution referred to Palestinian territory and Palestinian people but placed all the emphasis regarding protection of human rights at Israel's door. It also resolved to consider the same issue again at its 58th Session next year " as a matter of high priority". However, in itself this is nothing unusual as the Commission regularly considers this issue and uses the same phrases and terms to describe the areas of the West Bank and Gaza Strip.[114] Should it ever change its terminology then this would be fairly provocative, however until this occurs the significance of such resolutions should not be over-estimated.

During the 57th Session Mr. Giacomelli also gave an update on his report from the 5th Special Session. In Paragraph 6 he did draw,

"..the Commission's attention...to the determinations of the treaty bodies reaffirming that Israel has maintained "effective control" in all of the occupied territories and, therefore, holds treaty obligations to implement human rights there."[115]

This shows that, like the treaty bodies discussed in sections 2.1.1.1 to 2.1.1.6 above, the Commission is failing to understand fully the implications that the creation of the PA and the transfer of authority may have for the application of the test of effective control and Israeli responsibility.

At the 57th Session the Commission also heard the Report of the Inquiry Commission which during the 5th Special Session (examined above) it had requested investigate the

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[112] E/CN.4/RES/S – 5/1 27 October 2000.
[113] E/CN.4/RES/2001/7.
[114] See for example, E/CN.4/RES/2000/6 17 April 2000: Resolution on the "Question of the violation of human rights in the occupied Arab territories, including Palestine".

violation of human rights in the occupied Arab territories including Palestine.[116] The Inquiry Commission did seem to take a more realistic approach to the protection of human rights than had been seen by the Commission before. The Commission met with both PA and Israeli officials which is an important symbolic gesture in terms of considering abuse on all sides.

Whilst the Inquiry Commission still considered that overall Israel was the occupying power,[117] it did also criticise the PA for the abuses it has perpetrated[118] and it began to draw distinctions between the different areas within the West Bank and Gaza Strip and the areas controlled by the PA.[119] This is certainly a step-forward in terms of considering the full realities of the situation and the fact that abuses are being committed by both sides. In paragraph 114 the suggestion is made that an international presence in the area could assist in the monitoring of human rights abuse by all parties. The approach taken is therefore the most realistic and forward thinking of the bodies considered so far in this Chapter.[120] However, it remains to be seen whether any of the recommendations of the Inquiry Commission are implemented.

The Sub-Commission on the Promotion and Protection of Human Rights has been surprisingly quiet on the issue of human rights abuse in the West Bank and Gaza Strip. The Sub-Commission was established by the Commission on Human Rights and meets annually and reports to the Commission.[121] At its 46th session it,

> "Express[ed] its full support for...the Declaration of Principles signed by the State of Israel and the PLO which constitutes a positive contribution to the protection of human rights in the Middle East"[122]

However, the Sub-Commission has not returned to the issue of Palestinian human rights in recent years.

Overall, although some parts of the Commission's consideration of the Palestinian situation seem to take account of the realities of human rights abuse in the area (such as

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[115] E/CN.4/2001/30 21 March 2001.
[116] E/CN.4/2001/121 16 March 2001.
[117] Para. 41.
[118] Para. 26 and para. 12.
[119] Para. 22.
[120] It should also be mentioned that a Report to the Commission by the High Commissioner on Human Rights did consider abuses by the PA as well as those by Israel. However, it failed to consider the issue of effective control and how this may impact on protection of rights. (see E/CN.4/2001/114).
[121] Under the authority of ECOSOC Resolution 9 (II) of 21 June 1946.
[122] Resolution 1994/13 25 August 1994.

the Commission for Inquiry) it appears that, like the human rights treaty bodies there has overall been a failure to consider the full implications of the creation of the PA for the proper protection of human rights. Therefore the existence of an entity with variable personality and the effect this has on Israeli occupation demonstrate that existing United Nations human rights legal and political mechanisms are not adequately able to deal with a situation such as that in Palestine. This leads to the question of how else human rights can be protected in the Palestinian situation?

The first point of call is therefore the law of occupation in order to see how this could possibly work in a situation of occupation *sui generis*.

2.2: How can human rights be protected by the law of occupation in a situation *sui generis* with variable personality?

As it has been concluded that the West Bank and Gaza Strip are in an occupancy situation, albeit a special example of one, this has important implications in terms of the protection of human rights. Even before the question of how the law of occupation can work alongside variable personality, the issue arises as to whether there can be any human rights in a situation of occupancy as the upholding of civil and political rights is the antithesis of the notion of occupation. Indeed, any protection by a belligerent power against human rights abuse by that same power is a contradiction in terms. Furthermore, by giving a belligerent occupant human rights obligations to uphold, there is the danger that the legal order they impose could be unwittingly validated through other international legal mechanisms.

Variable personality bears upon the law of occupation because the situation in the Palestinian occupied territories is qualitatively different from other types of occupation, particularly since the DOP and the creation of the PA. Therefore as discussed above, Israel has become a different kind of occupant and the Palestinians living in the West Bank and Gaza Strip a different kind of occupied people.

It was shown in Chapter Three that variable personality has allowed Palestine to exist in the international community as a non-state but with a reasonable degree of international personality. The fact that it has been able to function on the international stage has

meant that it is having a very long transitory stage between occupation and statehood. Such a situation has been possible because the international community has been able to take individual action regarding recognition and accord Palestine varying degrees of status in different contexts. Therefore there has been less international pressure exerted to attempt to force an end to the troubles in the area through the creation of a fully fledged Palestinian state.

The overarching problem in relation to variable personality and the law of occupation is that there is a general assumption in the relevant Conventions that the occupied territory was, prior to occupation, part or all of an independent State in international law.[123] This was not so in the case of the West Bank and Gaza Strip as the land of the West Bank was administered by other Arab States. This problem reaffirms the need for a discussion of the law of occupation in the light of the Palestinian question.

Leading on from this there is one issue which is particularly problematic when examined in relation to the existence of variable personality; that of prolonged occupation. The very long transitory stage between occupation and statehood in the Palestinian situation has occurred partly due to the variable nature of Palestinian personality. The laws of occupation are designed to meet the needs of those involved in temporary occupations. Therefore, it is necessary to ask whether the current laws of occupation are appropriate in situations of variable personality.

Within the question of variable personality and prolonged occupation it will also be necessary to consider whether there is a cut off point when belligerent occupation could be considered to have ended. As can be seen in the Palestinian situation, the end of occupation may not be as simple as a full handing over of control from one side to another at one agreed moment in time. This may lead on to considerations regarding the customary test of effective control which is often used to determine whether a belligerent can be considered to occupy an area.

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[123] For example, Article 53 of Geneva Convention IV provides, "Any destruction by the occupying power of real or personal property belonging individually or collectively to private persons or to the State...".

2.2.1: Variable Personality and Prolonged Occupations

The question of prolonged occupations within the law of belligerent occupation is not a new problem for international lawyers.[124] Although there is no precise legal definition of when an occupation can be considered to be "prolonged", Roberts describes a prolonged occupation as,

> "An occupation that lasts for more than 5 years and extends into a period when hostilities are sharply reduced."[125]

He also suggests that the situation of prolonged occupation which has brought this international legal issue to the fore is that of the Israeli occupied territories.[126]

None of the international documents relating to occupations set a prescribed limit for the period of time occupation may last. However, Geneva Convention IV does provide for a transitional period during which some of the provisions of the Convention should no longer continue to be applicable:

> "In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the Present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."[127]

Since Additional Protocol I to the Geneva Conventions, it can be said that the above provision is technically abrogated.[128] Article 3 (b) of Protocol I provides, "The application of the Conventions and of this Protocol shall cease...on the termination of the occupation."

As Israel is not a party to Additional Protocol I it would be difficult to apply Article 3 (b) to the Palestinian situation.[129] More to the point, however, is the fact that when the

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[124] See for example, Roberts, "Prolonged Military Occupation".
[125] *Ibid.*, at 47. Roberts then goes on to list a few examples of prolonged occupations such as, the allied occupations of Germany and Japan, the South African occupation of Namibia, the Turkish presence in Northern Cyprus, the Moroccan forces in Western Sahara and the Vietnamese forces in Kampuchea.
[126] See for example, *ibid.*, at 44.
[127] Article 6 (3). This means that an occupying power is only bound to observe 43 articles of the Convention one a year after the close of military operations. See *ibid.*, at 55 – 56 for a discussion of the articles which would still require observance.
[128] The Additional Protocol deals with the protection of victims of international armed conflicts and supplements the 1949 Geneva Conventions.
[129] As noted above in note 65 the Protocol's status as customary international law is far from certain.

actualities of the development of the Palestinian situation regarding occupation are taken into account, the one year rule laid down in Article 6 (3) would be very difficult to apply. It would be hard to state exactly when "general military operations" ceased, or even if they did at all. This is particularly a problem in the Palestinian context because of the variable personality of the PA and the phased approach which was laid down in the Declaration of Principles and the steps taken towards peace. Furthermore, since the violent outbursts of 2000/2001 within the West Bank and Gaza Strip, the level of Israeli military activity has increased in order to attempt to resist Palestinian uprising. This, whilst not surprising, means that it is difficult to assess when occupation can be considered to have ended or in this case, lessened in intensity.

As discussed above, when Articles 42 and 43 of the Hague Regulations were considered the test for occupation is a factual one similar to that of the effective control test which has arisen many times in this thesis.[130] To recap, Article 42 provides that territory is occupied when "it is actually placed under the authority of the hostile army..." and Article 43 describes the occupying power as the entity into whose hands the authority of the legitimate power "...has in fact passed...".

In the light of this, the question to be asked in relation to variable personality, and in establishing its relationship with the law of occupation, is a factual one, which can be answered by an examination of the extent to which Israel is capable of controlling the life of the West Bank and Gaza Strip. As was discussed above in section 1.3 when it was being considered whether the West Bank and Gaza Strip were occupied territories, it was decided that they are a unique example of occupation which is unlike others which have gone before because of the existence of an entity with high, yet variable degree of status.

Some academics have suggested that a doctrine of historical consolidation exists in cases of prolonged occupation:

> "There comes a time when realities, however illegal or inequitable they may have been initially appear to have become irreversible and the world community's interest in orderliness and stability might justify cloaking it with the mantel of legality."[131]

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[130] See section 1.3 regarding the legal tests for occupancy.
[131] This was raised in the context of Indonesian occupation of East Timor by Fontein, in (1991) 45 *Australian Journal of International Affairs* 170.

In the context of variable personality such a suggestion is particularly abhorrent and completely destroys the notion of self determination of peoples. It reeks of the legalising of acquisition of territory through the use of force. Given the increased possibility of prolonged occupation where a situation of variable personality exists it would be highly dangerous to give credence to such a theory for it would destroy the chance of a gradual emergence of a peaceful settlement through the less than ideal, yet preferable creation of a new entity (such as the PA).

Once an occupation has continued for a prolonged period of time there is an argument to support the idea that there should be a distinct set of rules applied to the occupant. It is debatable whether the powers of the occupant should decrease (in order to allow the civilian population more input into public life, or whether they should increase in order to prevent the occupant from leaving the territory in an underdeveloped state.[132] It would be possible to undertake a study examining how far this is happening in Palestine and whether Israel is taking a sufficiently responsible attitude to the development of the territory.[133] It is submitted that whilst this issue is most certainly relevant to the Palestinian situation it is not of direct use to the question under consideration here – that of the relationship between variable personality and the law of occupation.

Overall it seems that the combination of a prolonged occupation and variable personality raises particular questions which are not fully answered by the current law of occupation. This means that because of the extended time which occupation has continued for, albeit in a *sui generis* style situation, that the law of occupation is not very effective at protecting the human rights of the Palestinian population.

Therefore the conclusions so far do not bode well for the protection of human rights outside of regular situations, whether attempts at protection are made through international human rights law or the law of occupation.

However, this leads on to a very interesting question which is perhaps the crux of this chapter. That is, whether in a situation which does not fall into the traditional

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[132] See Benvenisti, *The International Law of Occupation*, at 144 – 149; Roberts, "Prolonged Military Occupation" and Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources" chapter 14 from, Playfair, *International Law and Administration of the Occupied Territories* 419.

[133] Such a study is not undertaken here due to time and space, as this is an area more than worthy of at least an entire thesis.

mechanisms for human rights protection, there is an alternative way to attempt to shield the population from abuse.[134]

2.3: Is the situation different if one of the parties is an entity with variable personality, for example a non-state or emerging state entity?

Given the conclusions reached so far in this chapter, that the current systems of human rights protection are inadequate, whether they are through human rights law or the law of occupation, the logical approach to take is a new one. International law is clearly lagging behind the realities of international life, since it does not provide laws which are possible to apply effectively to situations such as the Palestinian problem.

Although the West Bank and Gaza Strip are in a situation of occupation *sui generis* it is likely that Palestine, as an emerging state with variable personality is not the only entity which may suffer as a result of having these characteristics.

It does not seem to be beyond the realm of possibility that a non-state entity should be encouraged to abide by human rights norms. This is particularly so if the entity is an emerging state and will in the future have to be accountable for its human rights records

Therefore, the following section aims to examine how entities which have a variable, yet significant level of personality on the international stage can be dealt with in order to ensure that their populations are not denied their human rights simply through lack of international legal protection.

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[134] For the purposes of this thesis alternative methods examined will be considered only in relation to the example of an emerging state entity with variable personality through applying them to the Palestinian situation.

3: TO WHAT KIND OF HUMAN RIGHTS REGIME COULD AN ENTITY WITH VARIABLE PERSONALITY BE SUBJECT?

Since the previous sections have demonstrated the difficulties which variable personality poses for international human rights protection it is instructive to consider ways in which the two could be reconciled if international recognition practice continues to result in the emergence of entities with a variable personality.

There are two main ways to reconcile them in through international legal mechanisms which are discussed in detail below. The first is to allow non-state entities with effective control of a particular territory to become parties to multilateral protection treaties, like the ICCPR, or at least to give them a certain level of participation and obligation. The second is to take a functionalist interpretation of customary international law in which non-state entities are bound by the customary elements of international human rights law.

3.1: Non-State entities as parties to multilateral human rights conventions?

International law does not generally allow non-state entities to become party to multilateral conventions.[135] The variable nature of personality of an entity such as Palestine obviously means that agreement regarding its status has not been reached and therefore different state parties would perhaps not be happy with Palestine as a party, albeit a non-state party.

In the case of a non-state entity signing and ratifying a convention such as the ICCPR there would need to be some test of when becoming a party was necessary and practical. However, it would be possible for tests such as the effective control test to be used. Once an entity is in effective control it can have a drastic effect on the human rights of the population and therefore should be subject to some level of scrutiny.

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[135] For example, Article 48(1) of the ICCPR provides that, "The present Convention is open for signature by any State member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant." See also Article 3 of the Vienna Convention on the Law of Treaties UN Doc. A/Conf 39/28; *UKTS* 58 (1980), which draws a distinction between those treaties concluded between states and those concluded between states and other subjects of international law.

The situation as to whether a non-state entity with variable personality should be able to become a party to a multilateral human rights convention would not always be clear cut as it may not be certain whether or for how long it may stay in effective control of the territory. However, in situations such as the Palestinian one, where the achievement of statehood appears to be simply a matter of time and it would be extremely unlikely that current powers would be taken away from those in effective control, there does not appear to be reason to deny the population the protection these instruments may afford them.

Within this section it is also necessary to consider the possibility that in some situations opponent states may be too great in number or power to enable a non-state entity to become a party to a multilateral convention. However, given the potential benefit to the population under its control, some level of non-state participation may be possible in order to keep a check on its power without making it a full party.

Before China signed the ICCPR[136] the Hong Kong Special Administrative Region was in a similar position. The population had rights as a result of UK sovereignty and when sovereignty was passed over to China, the rights remained. Therefore Hong Kong had a degree of participation and would have been due to report under Article 40 of the Covenant, had China not signed and taken on reporting obligations.[137] However, it is true to say that the situation in Hong Kong was slightly different to that of Palestine, since Hong Kong passed between states, rather than emerging as a new state. Nonetheless, there is no good reason why an emerging state, which is likely to achieve full statehood in time could not become a party to a treaty. Particularly if signing would result in the upholding of the aims and purposes of the treaty - which in a situation of human rights abuse would surely be the case.

Naturally, this would involve agreement between the existing parties to the treaty that its terms could be altered to include emerging state entities. However, since the terms of a treaty can vary from treaty to treaty, in theory at least, this is a possible solution. In controversial cases, like that of Palestine, where world opinion is divided, agreement

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[136] China signed on 5 October 1998.

[137] Arguably there was less pressure for Hong Kong to be allowed to accede to the Convention because the likelihood of statehood was not great. However in the Palestinian context, as pointed out above, the situation is somewhat different.

would be more difficult to reach. Agreement might be reached however, if it was clear that a non-state entity becoming party to a treaty did not constitute recognition of statehood by another party to the treaty.

It seems therefore that limited participation could be possible if the international community were unwilling to be sufficiently flexible to allow an entity to become a party. However, if statehood is extremely likely then not allowing full participation seems less justifiable.

With the practice of the Human Rights Committee in mind, it should be noted that the focus of protection of human rights is becoming less state-centric and more emphasis is being placed on rights as they attach to individuals/peoples.[138] In terms of securing greater protection for peoples whose rights are affected by non-state entities this is surely a step in the rights direction. However, the existence of variable personality means that further steps must be taken to place peoples' human rights within the scope of international legal protection.

It is submitted here that this kind of approach is needed because of the unbalanced international response to the question of human rights protection where a state and a non-state entity both affect a people's human rights. Whilst it is clear that the activities of the non-state entity are in desperate need of regulation by the international community, it is not suggested that the response to the state in question is necessarily ideal.[139] The point to remember however, is that in comparison the responses to the two different entities are unbalanced given the extent to which the non-state entity is able to abuse the human rights of its people.

As far as non-state entities are concerned the important advantage which this method of achieving human rights protection provides is that it gives them a yardstick to be judged by in terms of their human rights records. This is important because it would be the

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[138] See above in section 2.1.1.1 the Human Rights Committee General Comment No. 26.

[139] Dugard notes that the response of the international community towards Israeli abuse of Palestinian human rights is far from effective. He points out numerous possible ways to encourage Israeli compliance with human rights standards including, enforcement action under Chapter VII of the UN Charter; application of the Geneva Conventions and Hague Regulations; an advisory opinion on the matter from the International Court of Justice; non-recognition of the annexation of East Jerusalem; economic Coercion; exclusion from International Organisations; investigative Committees; the applicability of International Labour Organisation Conventions and the advancement of human rights through domestic courts – Dugard, "Enforcement of Human Rights in the West Bank and the Gaza Strip".

same mechanisms used to judge states and would surely only improve their status in the international community. Indeed, given the importance placed on human rights by states in recognition decisions, it would seem sensible from the point of view of non-state entities, for them to be encouraged to seek human rights monitoring through becoming parties to human rights treaties. If aiming to achieve statehood, they should look to have more emphasis placed on their ability to protect human rights through international legal mechanisms in order to further their cause. Such monitoring would therefore not only be simply a burden to them in terms of responsibility but also an advantage in seeking greater recognition.

3.2: Non-State Entities could be bound by customary international human rights law

It is submitted that based on a functionalist approach to the capacity of non-state entities, it is permissible to consider them bound by relevant customary law. In the *Reparations* case the Court was of the opinion that the UN was an international organisation which is endowed with international legal personality and that it had the capacity to bring international claims which were "necessitated by the discharge of its functions."[140]

The Court also stated that,

> "...the organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."

The functionalist approach to personality of a non-state entity was coupled by the Court with an approach which affirms an entity's obligations, responsibilities and duties rising from the exercise of its functions, as well as rights. However such an approach is not only advocated by the Court. Academics have also been keen to point out the merits of a functionalist approach due to the range of actors which have a meaningful role to play in the international community.[141]

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[140] Reparations for Injuries Suffered in the Service of the United Nations Case, Advisory Opinion, (1949) *ICJ Rep.* 174.

[141] Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" cited in Benvenisti, "Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements", at 310. Relevant parts of Schreuer's article are also used at the end of Chapter

When this functional based responsibility notion is applied to a non-state entity which is the government of an emerging state it can be argued that it is bound to follow customary human rights law. The safeguarding of the population under its effective control and the observance of their basic human rights would surely be considered to fall within its functions. To effectively discharge those functions within the framework of its obligations as a result of its international legal personality it must be bound by relevant customary law.

On the assumption that a functional responsibility argument is permissible it would then follow that in the Palestinian context the PA would be bound by the UNDHR[142] and those parts of the ICCPR and other human rights instruments which are part of customary international law.[143]

This kind of customary protection is obviously not as effective as protection though the international human rights covenants due to lack of scrutiny or enforcement procedures. However, particularly in conjunction with treaty based protection regimes the guarantees under customary law provide a basic standard of human rights for those effectively governed by non-state entities.

The advantages of encouraging a non-state entity to be subject to international law human rights standards are great. A functionalist approach to responsibility also ensures that as an entity's domestic powers increase so does its accountability in

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Four. Both uses rely on the functionalist approach to the responsibility of a non-state entity. The fact that both approaches are the same whether concerning general international responsibility or responsibility for human rights is important as it would create a more cohesive system of international law if similar tests were used in similar areas.

[142] According to Reisman's interpretation – Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *AJIL* 866, at 867 – 868. See also Filartiga v Pena-Irla which suggests that the UNDHR is an authoritative statement from the international community which creates expectations that it will be adhered to: (1980) 19 *ILM* 966. The Proclamation of Tehran at the conclusion of the International Conference on Human Rights also stressed that the UNDHR was an "obligation for members of the international community": 23 *GAOR*, A/Conf. 32/41.

[143] It is not possible here to provide a list of all customary human rights, however it has previously been attempted to clarify what may fall within this category. See, *Restatement of the Law: Third Restatement of the US Foreign Relations Law* Vol. 2 (1987) 165. The restatement does not necessarily represent the views of the US government but was prepared by American international lawyers. They stated that "A state violates international law if, as a matter of state policy, it practices, encourages, or condones, a) genocide, b) slavery or slave trade, c) the murder or causing the disappearance of individuals, d) the torture or other cruel, inhuman , or degrading treatment or punishment, e) prolonged arbitrary detention, f) systematic racial discrimination, or g) a consistent pattern of gross violations of internationally recognised human rights." See also, Harris, *Cases and Materials* (5th Ed), at 725 - 738 regarding customary international human rights law and Meron, "The Geneva Conventions As Customary Law".

relation to its population's human rights. It is underpinned by the theory that with rights come duties – an approach which is common when looking at the responsibilities of states. Furthermore as mentioned above at the end of section 3.1, by seeking to be part of an international human rights regime, an entity with emerging statehood would strengthen the legitimacy of their claims to be overseers of the rights of the population.

This study now moves on to consider some alternative ways in which greater human rights protection could be afforded to those subject to the jurisdiction of an entity with variable personality.

4: ARE THERE ANY OTHER WAYS OF PROTECTING HUMAN RIGHTS IN SUCH A SITUATION?

The suggestions discussed above are obviously only one way to approach human rights protection in a situation of variable personality and both involve subjecting the entity with variable personality to an existing international legal regime which would generally be reserved for states. The benefits of an approach which is based upon the actual functions of an entity being taken in account when determining the point at which it becomes responsible are great. It is submitted that this is perhaps the most effective way of positively protecting the rights of a population and taking preventative action in situations of variable personality.

However, there are alternative ways to both protect human rights and to encourage responsibility for human rights once they have occurred. This section aims to look at some of those possibilities. These are through the promotion and creation of internal human rights safeguards, the establishment of truth and reconciliation commissions and through the greater use of the political organs of the UN.

4.1: Greater promotion of the creation of internal human rights safeguards

The international community could also seek to protect human rights of those "governed" by an entity with variable personality through the promotion of internal safeguards for human rights.

There could perhaps be a conscious effort to do this at a policy level if there are negotiations which help give the entity power and control within the state. For example, in the Palestinian context, human rights could have had a higher profile and provisions regarding human rights inserted in the DOP or other interim agreements.

Whilst negotiations may not take place in every situation before a non-state entity realises effective control (for example in a coup), on the occasions where it does, human rights should be at the forefront of such plans.

In those situations where no agreements are reached regarding the power set-up in a state it is then the obligation of the international community to put pressure upon those in effective control to observe the human rights of the population. This could for example be done through refusing to recognise the new regime. This was done in Southern Rhodesia regarding the rebel white minority government of Ian Smith in 1965.[144]

To refer to the Palestinian situation, there has been a lack of international pressure upon the PA and its Chairman to implement human rights norms within the areas under their control. For example, despite the Legislative Council endorsing the Palestinian Basic Law, which as discussed above sets a reasonable level of rights protection and aims to uphold more strictly the rule of law, there has been a significant failure by the international community to bring Palestinian human rights infringements to the fore which has enabled Arafat to continue to refuse to sign the Basic Law.[145]

The action suggested in this sub-section is not intended to be an alternative to the two suggestions above regarding treaties and customary international law. Indeed if human rights are to be taken extremely seriously by all members of the international community, then the ideas suggested here could be implemented regardless. However, if the other suggestions are not implemented in practice, this third suggestion becomes all the more vital.

4.2: Truth and Reconciliation Commissions

In many South American States[146] and some African States[147] truth and reconciliation commissions were established following periods of human rights abuse.[148] It is right to

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[144] The General Assembly called upon "all states not to recognise any form of independence in Southern Rhodesia without the prior establishment of a government based on minority rule in accordance with General Assembly Resolution 1514 (XX)" – General Assembly Resolution 2379 (XXVI), (1968) (Voting: 92:2:17.) The resolution text can also be found at (1968) 7 *ILM* 1401.

[145] See above section 1.1.2.

[146] For example, Bolivia (no report has yet been published); Argentina, (*Nunca Mas: The Report of the Argentine National Commission on the Disappeared* 1986); Uruguay, (*Uruguay: Nunca Mas: Informe Sobre La Violacion A Los Derechos Humanos* (1972 – 1985)); Chile, (*Report of the Chilean National Commission on Truth and Reconciliation*); El Salvador (*From Madness to Hope; The 12 Year War In El Salvador: Report of the Commission on the Truth For El Salvador).*

point out that truth commissions do not protect against possible human rights abuse through standard setting. A truth commission *may* have the effect of lessening future abuses by attempting to heal old divisions in the country or by educating a population and bringing human rights to the fore, however this is a by-product rather than a definite product of a commission.

There is no reason why an entity that has variable personality would not be able to set up a truth and reconciliation commission in order to investigate past and current human rights abuse on its own part. Indeed, in this sense a truth commission is ideal as there are no issues which relate to variable personality which would bar such action. It is true to say that it would be unusual, though not impossible for an entity which was not the full government of a state to take such action. It might be difficult to ensure the legitimacy of a truth commission set up by an entity with variable personality or difficult to establish if funding was difficult to obtain. However, at a theoretical level at least it is not beyond the realms of possibility.

However there are a number of international legal issues in relation to truth commissions which have been dealt with differently by different states. There have been questions as to whether situations where peace settlements which involve amnesties for those who come and give evidence to the commission, (yet have committed gross violations of human rights), are compatible with state responsibility and human rights regimes.[149]

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[147] Uganda (1974 and 1986) (*Report of the Commission of Inquiry into the Disappearance of People in Uganda Since the 25th of January 1971*, cited in Carver, "Called to Account: How African Governments Investigate Human Rights Violations" (1990) 89 *African Affairs* 536 - the second Ugandan Report has not yet been published); Zimbabwe (there has reluctance to publish the report from the government due to tensions between the two main ethnic groups in the State); Chad, (*Report of the Commission of Inquiry into the Crimes and Misappropriations Committed By Ex-President Habré, his Accomplices and/or Accessories*, May 1992); South Africa, (*African National Congress: Report of the Commission of Enquiry into Complaints By Former African National Congress Prisoners and Detainees* (1992) and *Reports of the Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse Against ANC Prisoners and Detainees by ANC Members II* (20 August 1993); Rwanda, (*Report of the International Commission of Investigation on Human Rights Violations in Rwanda Since 1 October 1990 (7 – 21 January 1993) Final Report* (1993)); Ethiopia.

[148] Notable Commissions have also been established in Germany following reunification to investigate human rights violations following communist rule in East Germany (*Enquet Kommission Aufarbeitung von Geschichte und Folgen der SED-Diktator in Deutschland*) and in The Philippines in 1986 after the victory of Corazon Aquino's democratic government ending martial law in the country (the commission's work was cut short and no report was produced). For a comparative study of the different commissions See, Hayner, "Fifteen Truth Commissions – 1974 – 1994: A Comparative Study" (1994) 16 *HRQ* 597.

[149] There is a view that international law does not allow indemnity or amnesty in such situations. See, Sarkin, "The Trials and Tribulations of South Africa's Truth and Reconciliation Commission" (1996) 12 *SALJ* 617, at 627; Velasquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of July 29 1988, (1988) 9 *HRLJ* 212; Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth

There is also the issue as to who is held responsible and for what. This links in with some of the questions surrounding the giving of orders and superior responsibility which was touched upon in Chapter Four.[150] Until 1992 no truth commission had named individuals, however even a decision not to name names can be breached because of the complex and bitter situation which led to the decision to set up a Commission in the first place.[151]

It is interesting to note however that a truth commission has been willing to find a NLM responsible for human rights abuses.[152] The El Salvadoran Truth Commission found that the Farabundo Martí Liberation Front approved the assassination of civilian mayors and that the People's Revolutionary Army was responsible for a number of executions.[153] Therefore truth commissions can have a role to play in cases where non-state entities have committed human rights abuses.

However the interesting legal problems with truth commissions which were noted above exist separately from the question of variable personality and human rights which are being dealt with here. Nonetheless, they needed to be raised, if not discussed in detail. The main point to make is that truth commissions could be useful in situations such as Palestine, although their role until the peace process is over is limited.

4.3: Making Greater Use of the Political Organs of the United Nations

There is no doubt that one of the most important ways to encourage a regime to observe human rights standards is to bring the situation to the forefront of international debate. This is true whether an entity is a State or a non-state entity with variable personality.

Commissions, Impunity and the Inter-American Human Rights System" (1994) 12 *BUILJ* 321; Orentlicher, "Settling Accounts: The Duty To Prosecute Human Rights Violations of Prior Regime" (1991) *Yale LJ* 2537; Roniger and Sznajder, "The Legacy of Human Rights Violations and the Collective Identity of Redemocratized Uruguay".

[150] See section 2.1 of Chapter Four.

[151] The Chadian report gave names and photographs, the El Salvador Truth Commission named over forty officials, the second African National Congress Truth Commission in South Africa was conducted similarly to a trial of individuals and the Rwandan Commission named many officials including the President. In Argentina, the commission chose not to name individuals however a government leak gave the report to the Press and it became public knowledge – (see Hayner, "Fifteen Truth Commissions – 1974 – 1994: A Comparative Study", at 648.)

[152] As was mentioned briefly in section 2 of Chapter Four.

[153] Crahan, "The Salvadoran Truth Commission in Comparative Perspective", at 473.

Indeed, an entity seeking recognition as a State, such as Palestine, is likely to want to better its "image" in the international community, for this may affect the decisions of recognising states.

By using the weight of the General Assembly to issue resolutions which are explicit in relation to abuses which have occurred and directive as to exactly what action could be taken by the PA to reduce those abuses or behaviour, then increased international pressure could be brought to bear upon the situation.

The other political organ of the UN which could possibly be used effectively in a situation of variable personality in order to try to uphold human rights is the Commission on Human Rights.[154] Given the existing Commission involvement which was discussed in section 2.1.3 above, it would surely not be beyond the realm of possibility for its consideration of the issue to be expanded and for greater account of PA conduct in the same area to be examined.

As with action taken by any political body the embarrassment to the State when an adverse report is publicly discussed is significant, particularly as States are called on to defend themselves at the Commission's public meetings. So although there are no legally binding sanctions, the powers of the Commission can work well to bring the world's attention to a situation and to shame and persuade the State into hopefully taking some action to rectify their behaviour.

There appears to be no reason as to why the Commission's procedures could not be used to investigate the human rights record of an entity with variable personality. Since reports are generally on an *ad hoc* basis there would not necessarily be any problems regarding precedent setting in relation to non-state entities. Furthermore, as long as the report made it clear that the entity being investigated was not a state, there would not need to be any concern regarding implied recognition or political messaging regarding status.

In this respect the use of the Commission on Human Rights could potentially be an ideal method by which to encourage the respect for human rights by emerging actors on the

international stage which have sufficient status to exercise jurisdiction over the people they purport to represent. The only disadvantage the Commission has is the lack of teeth with which to enforce its reports' conclusions. However, a non-state entity is likely to be seeking to build a good relationship with other actors on the international stage and may want to demonstrate that it has a good human rights record. It is reasonable to suggest therefore, that the potential embarrassment and likely hurdles on the way to recognition which a bad report may produce, could be enough to encourage respect for human rights.

So far the last two main sections, 3 and 4, have looked at ways of achieving greater levels of human rights protection in variable personality situations. The following section then returns to consider the overall consequences for the protection of human rights in a situation of occupation *sui generis* due to variable personality.

[154] Established by ECOSOC under Article 68 of the UN Charter. ECOSOC was set up by Chapter X of the UN Charter and has 54 members. (Article 61(1) aims to implement the human rights standards laid down in Article 1 and 55 of the Charter).

CONCLUSIONS

Section 3 examined the ways in which an established human rights regime could be implemented in a situation of occupation *sui generis* where there is an entity with variable personality. However it is interesting to return to the issue of whether human rights law or occupation law is used to protect a population, as the consequences of which is used can be quite drastic. They are significant simply because apart from the different style of protection (or lack of it) that they both offer, the decision may help with the question of what level of status an entity possesses. The extent to which an entity with variable personality is encouraged to abide by the international law of human rights (which a state would be required to adhere to) may be a good indicator of where on the scale of possibilities of status it may lie.

In terms of the Palestinian situation, this means that the PA should be seeking to have its role in human rights protection recognised and validated by the international community precisely because it strengthens the legitimacy of their claims as overseers of the rights of the population. Any attempts by an entity with variable personality to try to exclude the applicability of human rights should have the opposite effect and therefore reduce its level of status on the scale of possibilities.

Therefore the logical corollary of this in the Palestinian situation is that if Israel wants to oppose Palestinian claims to statehood or increased personality it should attempt to discourage the international community from accepting Palestinian responsibility for human rights. However, this naturally means that Israel would be considered still to be responsible overall for the human rights of Palestinians living within the West Bank and Gaza Strip. This would mean at the very least that international humanitarian law would have to be applied.

Overall, a situation where an entity has variable personality and exercises a degree of control over a population can have a huge affect on the human rights of the population. They have the power to abuse human rights but international law lacks the means by which to regulate the activity of that entity. This shows that the reality of variable personality is not reflected in other important areas of international law. However, there is no need for this to sound the death knell for the theory of variable personality, indeed it cannot since in practice variable personality exists and recent international practice

shows no signs of decreasing, as exemplified through the Palestinian situation. In section 3 and 4 it has been shown that there are ways these gaps in protection could be filled that could work effectively and achieve a number of results.

First, they could provide a more comprehensive system of international law which takes into account the realities of the number of different types of actors which exist on the international stage. This requires international law to be flexible and allow a functional approach to rights and obligations in which the traditional notions about sovereignty may be challenged. When placed alongside a system which at a policy level places human rights at the forefront of its goals, then variable personality and human rights are extremely compatible.

Second, by assessing each non-state situation individually and dealing with the factual level of control an entity has within the relevant territory, it is possible to react to provide a more adequate system for the protection of human rights. If this were to be implemented it would mean much more protection could be afforded to all peoples and the plan of attaining universal human rights is more achievable. Human rights standards can after all only be truly upheld once all actors on the international stage in practice are subject to the same level of scrutiny regardless of their official status.

Third, they can assist in the evolution of a new responsible state as its personality evolves and its status is increased. This is vital if the international community aims to create a culture of responsibility where human rights protection is placed at the forefront of international life.

CONCLUSION TO PART II

The second part of this thesis has focussed on the question of whether variable personality is reflected in other areas of international law. It appears that there are three main conclusions which can be drawn from the last two chapters. The first relates to the broader implications of variable personality, the second to the nature of international law and the third to the ways in which some of the problems could begin to be dealt with.

(A): BROADER IMPLICATIONS OF VARIABLE PERSONALITY

International law does not cope adequately with the regulation of non-state entities with variable personality in the field of responsibility for wrongful actions on the international plane. It also does not provide suitable mechanisms to regulate the activity of such entities towards those subject to their jurisdiction. This is because the theory of variability in personality is not reflected in the make-up of the regulation in those specific areas of international life.

However, such a conclusion is not surprising given that the notion that personality may be variable is not in keeping with traditional international legal theory and that the range of actors found on the international stage is ever increasing and changing.

(B): THE NATURE OF INTERNATIONAL LAW

This leads to the second conclusion which relates to the nature of international law in general. It appears that given that gaps have formed in some areas of international law where there is insufficient regulation for some actors on the international stage, that international law is not yet fully formed into a cohesive body of law. This is also not surprising because of the *ad hoc* manner in which international law has been created and because of the constantly changing international scene. However, these gaps also suggest that when there are attempts at codification (such as through the International

Law Commission) more steps could be taken to help ensure that these gaps do not appear by taking into account the realities of international life.

(C): THE POSSIBILITY FOR REFORM

The third conclusion is a positive note on which finish this part of the thesis. In order to create a better regulated and more comprehensive system of international law there does not necessarily have to be wholesale change. As discussed in both Chapters Four and Five there are ways of using the international systems already in operation in both the field of responsibility and human rights in order to attempt to plug the gaps which have appeared. This would mean taking a functionalist and *de facto* approach towards new style entities and their relationship with international law in the light of the theory of variable personality. This approach would help to ensure that responsibility is taken for international wrongful actions, even when the wrong-doer is a non-state entity with a variable level of personality and would also assist in protecting the human rights of those under the jurisdiction of such an entity. Although these are only two areas of international law which have been specifically examined in the light of variable personality, there is no reason why other areas could not studied in the same manner.

By seeking to make emerging entities with variable personality take more responsibility for their actions and by encouraging them to accept the regulation of the international community in fields like human rights it is more likely that a co-operative and responsible state will emerge, which is aware of the effects of its actions on both its people and the rest of the world.

THESIS

CONCLUSION

The main conclusions to each part of this thesis have already been laid out in the conclusions to Part I and Part II of this thesis and therefore will not be reiterated here in great depth. Those conclusions should be referred back to in order to refresh the mind as to the important ideas which were drawn from the discussion in each part however.

Nonetheless, to draw this study to a close it is important to compare those conclusions with the aims which were laid down at the beginning of this study. The thesis aimed firstly to gather together recent state practice and reassess the nature of personality. Secondly, to examine the status of the Palestinian situation in order to further the understanding of the nature of personality. Lastly, it aimed to consider the implications which this reappraisal of the nature of personality may have for other areas of international law. It is submitted that the conclusions drawn in at the end of each part to this thesis have made headway in tackling these challenges. The first and second of these aims have been undertaken through the theory that personality is variable which was asserted in Chapter One and the discussion which followed in Chapter Three regarding the variable nature of personality of Palestine and the Palestinian Representatives of those in the West Bank and Gaza Strip. It can be remembered that the additional conclusion which grew out of Chapter Three as to the "Super" status of the PLO as a national liberation movement is an interesting extra point could perhaps developed in future study. The third aim of this thesis was tackled in Part II of this thesis through the examination of the broader implications of variable personality. The conclusions drawn in Part II are important as they provided not only discussion as to the broader implications of variable personality but also enabled reflection back as to the nature of the theory itself and the possibility for reconciliation of the current practice with other areas.

In general this thesis has taken not taken a formalist approach to the study of international law. It is hoped that through dealing with the realities of international life this study has resulted in an appraisal of state practice which encourages international

legal thinking to be forward-thinking and orientated towards process-led solutions to international legal problems. It is submitted that such approaches enable international law to develop and deal effectively with the challenges which are posed by the questions raised in this thesis.

Overall however there are also a couple of points which should be noted when Part I and Part II are considered in tandem. The first relates to the theory of variable personality and the second to international law in general.

(A): VARIABLE PERSONALITY

The theory that personality may at many different levels be variable was posited in Part I of this thesis. It seems true to say that the broader implications of variable personality as discussed in Part II do not necessarily support the existence of the theory which was promoted in Part I. This is because there was not found to be evidence of the potential for an entity's personality to be variable in the existing law examined in either Chapter Four or Five. However, it is suggested that this does not mean that the theory of variable personality must be incorrect, because as an emerging theory, notably about non-state entities, it is to be expected that international law would be unaware of its existence.

Indeed, the problems encountered for entities with variable personality in Chapters Four and Five seem to be mostly as a result of the incompatibility of the changing international scene with existing international legal frameworks. It is clear that in modern times non-state entities can have a meaningful role to play on the international stage but that the rest of international law has not always kept abreast of these developments. It is not strange to suggest therefore that it is the variable nature of an entity's personality which causes those problems and that as a result current international law is unable to effectively regulate its activities. Given that the theory of variability personality has emerged from a reappraisal of the nature of personality it is not surprising that it is not reflected in existing international law. Therefore in a upside down way it is almost the lack of international law's ability to cope with the notion of variable personality which suggests that it is a real phenomenon.

(B): GENERAL INTERNATIONAL LAW

It is of importance to continue to remember the significance that the international norms and customs relating to personality and recognition can have upon other areas of international law. As examined in Part II, if personality is not taken into sufficient account when considering other areas of international regulation, gaps can begin to appear where entities with a significant amount of power on the international stage can act comparatively unregulated.

Whilst it is true that international law is not a fully formed comprehensive body of rules, it is no doubt preferable that when international law is created or states take action which may eventually form custom, that the international community is aware of the most current thinking in all areas which may impact on the rest of the system. In this respect the assertion made in this thesis that personality is variable in nature has considerable influence in relation to general international law. Personality is of primary importance to ascertaining which entities act on the international stage and to what extent they operate. Without a solid understanding of practice regarding personality the rest of international law is to a degree operating in the dark, not clear about which and how entities operate in the international community. Whilst the assertion that personality is variable does to a certain extent make that understanding more difficult, it at the very least means that the reality and the complexities of international life are faced head on rather than blissfully ignored. Such understanding can only assist in eventually creating a more comprehensive and hopefully more realistic body of international law.

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Appendix I: Organisation Chart for the PLO and the PA

PALESTINIAN AUTHORITY:		PALESTINIAN LIBERATION ORGANISATION:
• Established in Declaration of Principles 1993 • Acts as a governing body for Palestinian controlled areas in the West Bank and Gaza Strip. • Does not represent Palestinians in the Diaspora. • Has no foreign relations powers. These are still exercised by Israel	**BODY**	• Established in 1964 • Acts as representative of all the Palestinian people at an international level. • Has foreign relations powers and is a "super" observer in the United Nations.
President: Yasser Arafat Elected by Palestinians in the West Bank and Gaza Strip. Member of the PLC by virtue of office.	**HEAD**	**Chairman:** Yasser Arafat Elected by the PNC Leader of the Executive Committee.
Cabinet: • 20 Ministers. • Appointed by President.	**EXECUTIVE WING**	**Executive Committee:** • 18 members • Elected by PNC.
Palestinian Legislative Council (PLC): • The Parliament of the PA. • 88 members. • Elected by the Palestinians of the West Bank and Gaza Strip to represent them. • Powers limited to those given in the Palestinian/Israeli agreements.	**LEGISLATIVE WING**	**Palestinian National Council (PNC):** • The Parliament of the PLO. • 669 members. • Appointed by the Executive • Represents all Palestinians and many Palestinian bodies, including professional organisations and trade unions.
Palestinian Police Force and Palestinian Security Force	**ENFORCEMENT**	**Palestinian Liberation Army**

Appendix II

States which recognised the State of Palestine after the 15 November1988 Palestinian Declaration of Statehood.[1]

State	Date of Recognition
1) Afghanistan	16/11/1988
2) Albania	17/11/1988
3) Algeria	15/11/1988
4) Angola	06/12/1988
5) Austria	14/12/1988
6) Bahrain	15/11/1988
7) Bangladesh	16/11/1988
8) Benin	
9) Bhutan	25/12/1988
10) Botswana	19/12/1988
11) Brunei	17/11/1988
12) Bulgaria	25/11/1988
13) Burkina Faso	21/11/1988
14) Burundi	22/12/1988
15) Byelorussian SSR	19/11/1988
16) Cape Verde	24/11/1988
17) Central African Republic	23/12/1988
18) Chad	01/12/1988
19) China	20/11/1988
20) Comoros	21/11/1988
21) Congo	05/12/1988
22) Cuba	16/11/1988
23) Cyprus	18/11/1988
24) Czechoslovakia	18/11/1988
25) Democratic Kampuchea	18/11/1988
26) Democratic People's Republic of Korea	24/11/1988
27) Democratic Yemen	15/11/1988
28) Djibouti	17/11/1988
29) Egypt	18/11/1988
30) Equatorial Guinea	
31) Ethiopia	04/02/1989
32) Gabon	12/12/1988
33) Gambia	
34) German Democratic Republic	18/11/1988
35) Ghana	29/11/1988
36) Guinea	19/11/1988
37) Guinea-Bissau	21/11/1988
38) Hungary	23/11/1988
39) India	18/11/1988

[1] Listed in "For the Record: The State of Palestine", (1989) V *Pal. YBIL* 290, at 291 – 293. Where there are gaps in the date column no official date was recorded.

40) Indonesia	15/11/1988
41) Iran	04/02/1989
42) Iraq	15/11/1988
43) Jordan	16/11/1988
44) Kenya	
45) Korea, North	
46) Kuwait	15/11/1988
47) Laos People's Democratic Republic	02/11/1988
48) Lebanon	
49) Libyan Arab Jamahiriya	15/11/1988
50) Madagascar	16/11/1988
51) Malaysia	15/11/1988
52) Maldives	28/11/1988
53) Mali	26/11/1988
54) Malta	16/11/1988
55) Mauritania	15/11/1988
56) Mauritius	17/11/1988
57) Mongolia	22/11/1988
58) Morocco	15/11/1988
59) Mozambique	08/12/1988
60) Namibia (SWAPO)	19/11/1988
61) Nepal	19/12/1988
62) Nicaragua	16/11/1988
63) Niger	24/11/1988
64) Nigeria	18/11/1988
65) Oman	13/12/1988
66) Pakistan	16/11/1988
67) People's Republic of Kampuchea	26/11/1988
68) Poland	14/12/1988
69) Philippines	
70) Qatar	16/11/1988
71) Romania	02/01/1988
72) Rwanda	02/01/1989
73) Sao Tome and Principe	10/12/1988
74) Saudi Arabia	16/11/1988
75) Senegal	22/11/1988
76) Seychelles	18/11/1988
77) Sierra Leone	03/12/1988
78) Somalia	15/11/1988
79) Tanzania	24/11/1988
80) Sri Lanka	18/11/1988
81) Sudan	17/11/1988
82) Togo	29/11/1988
83) Tunisia	15/11/1988
84) Turkey	15/11/1988
85) Uganda	13/12/1988
86) Ukrainian SSR	19/11/1988
87) USSR	19/11/1988
88) United Arab Emirates	16/11/1988
89) United Republic of Tanzania	24/11/1988
90) Vietnam	19/11/1988

91) Yemen	15/11/1988
92) Yugoslavia	16/11/1988
93) Zaire	10/12/1988
94) Zambia	16/11/1988
95) Zimbabwe	29/11/1988

APPENDIX III

Research Letters Written regarding the Status of the Palestinian Representation to Individual States

In May 1998 I wrote to all the States which had diplomatic offices in either London or Paris in order to gain an insight into the status which they consider the PLO to have. I asked each State to answer three specific questions.[1]

1) Whether their government had recognised the PLO and the date of recognition?

2) What their government had recognised the PLO as?

3) Whether their government regards the PLO as the sole legitimate representative of the Palestinian people. If their government does not then are there any alternative bodies which are recognised as such?

Overall I wrote to 190 different High Commissions and Embassies. 59 States replied directly to at least some of the specific questions I had posed.[2] 21 others were not able to answer the questions themselves and passed the information on to the equivalent of the Foreign and Commonwealth Office in their State. However the vast majority of these I never received a reply from.

Whilst 59 replies does not provide a solid basis for making global conclusions about the status of the Palestinian Representation it is interesting to examine the replies received. They obviously demonstrate the relationship between the responding State and the PLO, but interestingly also show that on the whole the responding States did not traditionally tend to be more pro-Palestinian than those which did not respond at all.

This can be shown by breaking down the States which responded into the same political and continental groupings which were used in chapter three when the States which

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[1] A copy of the letter I wrote is attached to this appendix as Document A. All the replies are also copied and attached to this Appendix.
[2] Including the Holy See.

recognised the State of Palestine in 1988 are examined. Of the 59, 16 of the States were from Asia,[3] 14 were from Western Europe,[4] 11 were from the Americas,[5] 8 were from Africa,[6] 8 were from Eastern Europe[7] and 2 were from the Middle East.[8]

The results from the specific questions I posed are as follows:

Question 1:

39 State stated that they had recognised the PLO in some form[9] and a further 6 stated that they had not officially recognised it but did have a *de facto* relationship with it.[10]

Not all States that responded were able to give a date for recognition. However of those that did, some States wrote that they recognised the PLO first at around the time of its inception[11] (even if they then went on to recognise it again as a different style entity), others during the 1970s[12], others after the 1988 Declaration[13] and others after the 1993[14] Oslo Accords.[15]

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[3] Asian States (including Australasia): Australia, Bangladesh, Brunei Darusalaam, Cambodia, China, Indonesia, Korea, Maldives, Nepal, New Zealand, Papua New Guinea, Philippines, Singapore, Thailand, Turkmenistan, Tuvalu.
[4] Western European States: Austria, Belgium, Cyprus, Denmark, Finland, Germany, Iceland, Ireland, Liechtenstein, Malta, Monaco, Netherlands, Sweden, Switzerland,
[5] States from the Americas: Antigua & Barbuda, Belize, Brazil, Chile, Columbia, Dominica, Equador, Marshall Islands, Mexico, Uruguay, Venezuela,
[6] African States: Algeria, Burundi, Madagascar, Mauritius, South Africa, Sudan, Tanzania, Zimbabwe,
[7] Eastern European States: Estonia, Hungary, Macedonia, Poland, Slovak Republic, Slovenia, Ukraine, Yugoslavia.
[8] Middle Eastern States: Lebanon, Israel.
[9] Algeria, Australia, Austria, Bangladesh, Belgium, Belize, Brazil, Brunei, Burundi, Cambodia, Chile, China, Columbia, Cyprus, Estonia, Hungary, Iceland, Indonesia, Israel, Korea, Lebanon, Madagascar, Maldives, Malta, Mauritius, Mexico, Netherlands, Papua New Guinea, Philippines, Poland, Slovak Republic, Slovenia, Sudan, Sweden, Tanzania, Thailand, Venezuela, Yugoslavia, Zimbabwe.
[10] Dominica, Finland, Nepal, Turkmenistan, Uruguay, Ukraine.
[11] Algeria, China, Hungary, Iceland, Tanzania, Yugoslavia.
[12] Brazil (although also upgraded diplomatic status in 1988 and 1993), Burundi, Malta, Mexico, Netherlands (*de facto* recognition), Thailand.
[13] Bangladesh, Czechoslovakia (Czech Republic continued contact when it became independent in 1993).
[14] Australia, Belgium (upgraded to a General Delegation after Oslo), Cambodia, Chile, Netherlands (formal recognition since Oslo), Philippines, Poland, Sudan.
[15] Other dates for recognition were, "26.9.79 – 11.3.80" (Austria), "1.1.84" (Brunei), "1996" (Columbia), "1992" (Estonia – after creation of State), "1995" (Korea), "4.4.82" (Maldives), "September 1992" (Papua New Guinea), "1992" (Slovenia – after creation of State), " From the time of Ukrainian independence" (Ukraine), "1980" (Zimbabwe).

Question 2:

Some States recognise the PLO as a government,[16] others as the government of an emerging State,[17] others as a national liberation movement,[18] and some as the legitimate representative[19] or sole legitimate representative[20] of the Palestinians.[21]

Question 3:

Just over half of the States which replied considered the PLO to be the sole legitimate representative of the Palestinians.[22] Of those which did not, quite a few either did not specify any answer with regard to this issue[23] and some stated that the PLO was the "legitimate representative" of the Palestinian people.[24]

With regard to the second limb of Question 3, as to whether any alternative bodies were considered to be representatives of the Palestinian people there were only a few responses. Australia stated that it recognised no other bodies as such. Denmark stated that she did not consider the PLO to be the sole legitimate representative, suggesting by implication that there must be other possible bodies as well. In a similar vein, Finland called the PLO "a significant representative" and Hungary, without being specific, stated that her Government "has had relations with several other Palestinian organisations as

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[16] Cambodia, China, Mauritius, Poland, (Some of these States merely wrote that they recognised the State of Palestine from which it is assumed that they must therefore recognise the PLO (or the PA) as the government. – see attached copies of letters for individual responses).
[17] Algeria, Papua New Guinea, Philippines, Tuvalu.
[18] Burundi, Hungary, Iceland, Indonesia, Mexico, Slovakia, Tanzania, Thailand.
[19] Australia, Chile, Maldives, Netherlands, Slovenia.
[20] Bangladesh, Belize, Brunei, Columbia, Korea, Madagascar, Malta, Sudan, Turkmenistan, Ukraine, Venezuela, Yugoslavia.
[21] Other responses included: "Subject of international law" (Austria), "the Representative of the PA" (Belgium), "Special Palestinian Delegation" (Brazil), "Agreeing with EU policy" (Cyprus), " As having an internationally recognised mandate to represent the Palestinians" (Estonia), "de facto political entity" (New Zealand), "Leading political component of Palestine" (South Africa), " Most authoritative and representative body of the Palestinians" (Sweden), "Government in Exile" (Zimbabwe).
[22] 32 States: Algeria, Antigua and Barbuda, Austria, Bangladesh, Belgium, Belize, Brunei, Burundi, Cambodia, China, Columbia, Estonia, Indonesia, Israel, Korea, Macedonia, Madagascar, Malta, Mauritius, Mexico, Nepal, Papua New Guinea, Philippines, Poland, Slovak Republic, Sudan, Thailand, Turkmenistan, Ukraine, Venezuela, Yugoslavia, Zimbabwe,
[23] For example, Cambodia, Columbia, Cyprus, Dominica, Estonia, Ireland, Lebanon.
[24] For example, Australia, Brazil, Chile, Zimbabwe.

well.". Slovenia stated that she considered the PLO to be the "legitimate but not only representative" of the Palestinian people, despite not having recognised any other group as such, whilst South Africa stated that the PLO was a "leading Palestinian political component". New Zealand was by far the most specific, replying that other bodies which can be considered to represent and speak for the Palestinian people are "the Palestinian National Authority, the Palestinian National Council, the Palestinian Legislative Council and Hamas".

This range of responses perhaps is partially representative of the lack of formalised objective status of the PLO or particularly any of its competitors for status in the international community. However, it is interesting to note that those States which responded to the second limb of question 3 are from a fairly wide cross section of different parts of the international community. Therefore it is difficult to draw any conclusions (other than with regard to the position of individual states) from the responses to this particular part of the question.

Although the States which responded were not necessarily only those which have traditionally been supportive towards the Palestinian Representation, it is not surprising to see that the States which recognised the PLO as having the greatest levels of status were.[25] Indeed this trend continues when it considered that the States which extended recognition to the PLO before the Oslo Accords were all politically pro-Palestinian.[26]

Therefore, although the number of replies received were not overwhelming, even from this limited examination it is easy to conclude that the world political groupings in terms of Palestinian support and recognition discussed in chapter 3 are firmly reiterated in the letters from States themselves.

---

[25] For example, Cambodia, China, Mauritius, Poland recognised the PLO as the government of Palestine and Algeria, Papua New Guinea, Philippines, Tuvalu recognised the PLO as the government of an emerging State.

[26] With the exception of the Netherlands - although this recognition during the 70s was purely on a *de facto* basis.

example letter. DOCUMENT A.

UNIVERSITY OF BRISTOL

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Tel: 0117 9288991

May 21, 1998

The Director of Legal Affairs
State of Afghanistan
31 Prince's Gate
London
SW7 1QQ

Dear Sir or Madam

Re: The Status Accorded to the Palestine Liberation Organisation by the Government of Afghanistan

I am a researcher in the field of public international law at the University of Bristol and am currently conducting a study establishing what the status of the Palestine Liberation Organisation is in international law.

In order to do this effectively I need to gather information directly from governments as to their position regarding the Palestinian Liberation Organisation. It would therefore assist me greatly if you would be kind enough to reply to me and supply me with the following information regarding the position of your government.

1) Whether your government has recognised the Palestinian Liberation Organisation and the date of recognition.

2) What your government has recognised the Palestine Liberation Organisation as. (i.e.: as a liberation movement, a government in exile, a government of an emerging state.)

3) Whether your government regards the Palestinian Liberation Organisation as the sole legitimate representative of the Palestinian people. If your government does not then I would be grateful if could please tell me if there is an alternative body which is recognised as such

I would like to take this opportunity to thank you in advance for your co-operation in this matter. I look forward to hearing from you.

Yours faithfully

Caroline Jackson, LL.B. (Hons), LL.M.

Embassy of Algeria
London

سفارة الجزائر
لندن

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

May 26th, 1998

Dear Ms. Jackson,

Further to your recent letter, I should like to inform you that :

1. The Algerian authorities recognised the Palestinian Liberation Organisation not long after its creation.

2. The Algerian government has recognised the Palestinian Liberation Organisation as the government of an emerging state.

3. The Algerian government regards the PLO as the sole legitimate representative of the Palestinian people.

I hope that the above answers your questions on the position of the Algerian government vis-à-vis the PLO.

Yours sincerely,

C.R. Kaid,
Counsellor

54 Holland Park, London W11 3RS. Tel. 0171-221 7800 Fax. 0171-221 0448

HIGH COMMISSION FOR ANTIGUA AND BARBUDA

15 THAYER STREET, LONDON W1M 5LD
TEL: 0171-486 7073/5 FAX: 0171-486 9970

His Excellency Mr Ronald M Sanders CMG
High Commissioner

22nd June 1998

Ms Caroline M Jackson
Department of Law
University of Bristol
Willis Memorial Building
Queen Road
Bristol BS8 1RJ

Dear Ms Jackson,

Thank you for your letter of 21st May and 19th June 1998. I am sorry that it required a second letter from you before this response.

The answers to the questions you asked are as follows:

1. My Government has not recognised the PLO
2. Were we to recognise them as this time, it would be as the Government of an emerging State
3. My Government does regard the PLO as the sole legitimate representative of the Palestinian people.

Please note that the reason we have not recognised the PLO is that the issue of such recognition has not arisen. If the PLO approached us for recognition we would do so in accordance with the answers to 2 and 3 above.

Yours sincerely,

RONALD M SANDERS CMG
High Commissioner

AUSTRALIAN HIGH COMMISSION

AUSTRALIA HOUSE
STRAND
LONDON WC2B 4LA
0171 379-4334

11 June 1998

Ms Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
BRISTOL BS 1RJ

Dear Ms Jackson

Thank you for your letter of 21 May 1998 enquiring about the status accorded to the Palestinian Liberation Organisation by the Government of Australia. In answer to your question, the Australian Government recognised the PLO as the "legitimate representative" of the Palestinian people at about the same time as Israel did after the Oslo talks. We do not accord recognition to any alternative bodies.

Yours sincerely

M E Twomey

Margaret Twomey
First Secretary

AUSTRIA 1998

ÖSTERREICHISCHE BOTSCHAFT
AUSTRIAN EMBASSY

London, 1. July 1998

Mrs. Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol BS8 1RJ

GZ. 8.60/6/98

Dear Mrs. Jackson,

Re: The Status accorded to the PLO by Austria

After consultation with our authorities in Vienna as well as on the basis of academic research I am pleased to answer your questions concerning above matter as follows:

1. Austria recognised the PLO by various statements of Foreign Minister Pahr and Chancellor Kreisky between 26 September 1979 and 11 March 1980 (Neuhold/Hummer/Schreuer, Österreichisches Handbuch des Völkerrechts, Vienna 1991).

2. Austria recognised the PLO as a subject of international law sui generis.

3. Austria regards the PLO as the sole legitimate representative of the Palestinian people.

In concluding let me stress that above communication is neither a political nor legally binding statement.

Yours sincerely,

Martin Krüger
First Secretary

Austrian Embassy, 18 Belgrave Mews West, London SW1 X8HU
Tel: ++44 171 235 3731/Fax: ++44 171 344 0292
e-mail: austria@embassy.org.uk

HIGH COMMISSION FOR THE PEOPLE'S REPUBLIC OF BANGLADESH
28 Queen's Gate, London, SW7 5JA
Phone : 0171 584 0081
Telex : 918016
Fax : 0171 225 2130

NO.POL-SPL-3/96

Dated: 10 July 1998

Dear Ms.Jackson,

Please refer to your letter dated 21 May 1998 addressed to Director of Legal Affairs, Bangladesh High Commission.Your letter was forwarded to the Ministry of Foreign Affairs, Bangladesh and we have received the following statement with regard to Palestine and PLO:

Quote

"Bangladesh has consistently maintained that the Palestinian people have the inalienable right to self-determination including their right to have a state of their own in their homeland with Al-Quds as its capital, under the leadership of PLO, their sole and legitimate representative. It was in persuant to her principled position that Bangladesh became one of the first countries to accord recognition to the State of Palestine when it was proclaimed on 15 November 1988."

Unquote

Yours Sincerely

(Kamral Ahsan)
Counsellor

Ms.Caroline M.Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

EMBASSY OF BELGIUM

103 Eaton Square
London SW1W 9AB

Tel 0171 470 37 68

London, 17 June 1998

Nr : 6036
Dos.: B21
MLV/rv

Re: The Status Accorded to the Palestine Liberation Organisation by the Government of Belgium.
My letter of 29/05/98.

Dear Ms Jackson,

I am pleased to be able to communicate to you the answer to the questions asked in your letter of 21 May 98.

1) Belgium has recognised the PLO at the end of the eighties as a "Bureau d'information de l'OLP".
2) As a result of the Oslo Agreements the "Bureau d'information de l'OLP" has been upgraded to a "Délégation générale palestinienne" in 1993, with Mr C. ARMALI as its representative.
3) Belgium entertains official contacts with the PLO as representative of the Palestinian Authority and consequently there is no alternative body recognised as such.

Yours sincerely,

Marie-Louise Vanherk
Minister-Counsellor

Ms Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Ministry of Foreign Affairs

BELIZE, CENTRAL AMERICA

Reference: FA/D/87/98(35) 18th June, 1998

Caroline M. Jackson, Esq.
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Madam,

Reference is made to your correspondence of 21 May, 1998, regarding the status of the Palestinian Liberation Organization (PLO).

Please be advised that Belize regards the PLO as the sole legitimate representative of the Palestinian people.

Highest regards,

OLIVER D. DEL CID
For Permanent Secretary

ODDC/bcs

BRAZILIAN EMBASSY
32 Green Street
London W1Y 4AT

June 25th, 1998.

Caroline Jackson, LL.B. (Hons), LL.M.
UNIVERSITY OF BRISTOL
Department of Law
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Miss Jackson,

Thank you for you two letters enquiring about the Brazilian position regarding the Palestinian Liberation Organization. Further to the telephone call you received from Mr Nelson Lafraia, I am sending you the notes enclosed which I believe answer your three questions.

The lists of Internet sites in English also enclosed may be of additional assistance to your research.

Yours sincerely,

Tovar da Silva Nunes
First Secretary

BRAZIL and PLO

Brazil recognizes the Palestine Authority as a legitimate entity resulting from the peace accords between Israel and the PLO (specially the Agreement on the Gaza Strip and Jericho of May 1994) and as the legitimate representative of the Palestine People. Brazil does not recognize, however, the existence of a Palestine State because it considers that some basic conditions established by International Law for a state to exist are still lacking (territorial delimitation, for example).

Formal relations between the Federative Republic of Brazil and the Palestine Liberation Organization (PLO) date from 1975, when Brazil authorized PLO to assign a representative to the Office of the League of Arab States in Brasilia.

In 1993, after an exchange of notes between the Government of Brazil and the PLO, this representation was upgraded to a "Special Palestine Delegation", with diplomatic status similar to that granted to international organizations in Brazil.

On 29th April 1998, the following modifications were introduced to the List of Diplomatic Missions accredited to Brazil:
a) the name of the Special Palestine Delegation, which was previously included in the section "International Organizations", was included in the section reserved for "Countries and Delegations", immediately after "Zambia" and before the "European Union".;
b) within the order of precedence of Heads of Missions, the name of the Head of the Special Palestine Delegation was included in the position corresponding to the date of presentation of his credentials.

The above mentioned modifications should not be construed as altering the nature of the status of the Palestine Delegation vis à vis the Brazilian Government. Their purpose is rather to reflect more adequately the political and geographical reality of the Middle East after the Oslo agreements.

TELEGRAMS: BRULONGOV
TELEX: 888369
TEL : 0171-581 0521
FAX : 0171-235 9717

سورهيجاي تيڠكي نكارا بروني دارالسلام
HIGH COMMISSION OF BRUNEI DARUSSALAM

19 Belgrave Square
London SW1X 8PG

Our Ref: *BHCL 339: 11/2*

Your Ref:

7th July 1998

Ms Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Ms Jackson,

Re: The Status Accorded to the Palestine Liberation Organisation by the Government of Brunei Darussalam

With reference to your letter dated 21 May 1998 regarding the above, I am pleased to inform you that since Brunei Darussalam resumed full independence on 1 January 1984, the country recognised the PLO as the sole legitimate representative of the Palestinian people. It has supported the inalienable rights of the Palestinian people including their rights to self-determination and to the establishment of an independent state of Palestine.

Yours sincerely,

(Masurai Masri)
Second Secretary
for the High Commissioner

REPUBLIQUE DU BURUNDI

Bujumbura, le 26/1/98

MINISTERE DES RELATIONS EXTERIEURES
ET DE LA COOPERATION

N° 204.09/ 177 /RE/98.

Mademoiselle Caroline M. Jackson
Department of Law
Wills Memorial Building
Queens Road
The University of Bristol
BS8 IRJ
ROYAUME -UNI

Mademoiselle,

J'ai l'honneur d'accuser réception de vos correspondances des 29 mai et 1er juin 1998 par lesquelles vous me demandez des informations sur la position de mon pays en ce qui concerne l'Organisation de Libération de la Palestine.

Je vous remercie d'avoir bien voulu consulter mon Gouvernement dans le cadre de vos recherches en droit international et porte à votre connaissance ce qui suit :

1° Le Gouvernement du Burundi a reconnu l'Organisation de Libération de la Palestine (O.L.P.) après la guerre de 1973.

2° Le Gouvernement du Burundi a reconnu l'O.L.P. en tant que Mouvement de Libération nationale.

3° Le Burundi a reconnu l'O.L.P. comme le seul et unique Représentant Légitime du peuple palestinien.

Tout en espérant que nous avons satisfait à votre questionnaire et en vous souhaitant plein succès dans votre recherche, je vous prie d'agréer Mademoiselle, l'assurance de ma considération distinguée.

LE DIRECTEUR GENERAL DE L'ADMINISTRATION,
DES AFFAIRES JURIDIQUES ~~ET DU CONTENTIEUX~~,

Rénovat NDAYIRUKIYE.

AMBASSADE ROYALE DU CAMBODGE

N° 221-98 ARC/AG

Paris, le 2 juillet 1998

Mademoiselle,

Faisant suite à votre lettre du 29 juin 1998, j'ai l'honneur de porter à votre connaissance que le Gouvernement Royal du Cambodge a reconnu l'Organisation de Libération de la Palestine, qui est actuellement un Etat souverain en conformité avec la Constitution du Royaume du Cambodge du 24 septembre 1993.

L'article 53 de la Constitution stipule que "Le Royaume du Cambodge pratiquera toujours une politique permanente de neutralité et de non-alignement. Le Royaume du Cambodge entend vivre en co-existence pacifique avec les pays voisins et les autres pays du monde".

Actuellement, le Royaume du Cambodge entretient des relations diplomatiques avec la Palestine et Israël.

Je vous prie d'agréer, Mademoiselle, l'expression de ma considération distinguée.

SOK SOPHOAN
Conseiller

Mademoiselle Caroline M. JACKSON
Department of Law - University of Bristol
Wills Memorial Building
Queens Road
BS8 IRJ B R I S T O L
Grande-Bretagne

EMBASSY OF CHILE

12 DEVONSHIRE STREET
LONDON W1N 2DS
TEL: 0171-580 6392/7
FAX: 0171-436 5204
TELEX: 25970 EMBACHIL

23 June 1998

Miss Caroline Jackson, LL.B. (Hons), LL.M.
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Dear Miss Jackson

Further your letter dated 19 June 1998, I have the pleasure to inform you that by Decree No.1414, dated 12 November 1993,Chile recognized the Palestine Liberation Organisation as representative of the Palestinian people, and gave to the "Oficina de Información Palestina" (Palestinian Information Office) in Santiago a diplomatic status with the diplomatic immunities and privileges established in the Vienna Convention.

Later, by Decree No. 57 dated 18 January 1994, the name of the "Oficina de Información Palestina" (Palestinian Information Office) was replaced by "Representación Palestina" (Palestinian Representation)

Yours sincerely,

Jorge A. Tagle
Second Secretary

中华人民共和国驻英国大使馆
Embassy of the People's Republic of China
49-51 Portland Place, London W1N 4JL

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Dear Ms. Jackson,

As requested, I am introducing you the position of Chinese Government on Palestinian Autonomous Government.

China has all along supported the justified course of the Palestinian people struggling for their national rights. In May 1965, the Palestine Liberation Organisation set up an office in Beijing which enjoys the privilage of diplomatic mission. On 20, November 1988, China and the State of Palastine founded the diplomatic relationship.

I hope the above information may be helpful for your reference.

Yours sincerely,

Hua Ning
Press Officer

Protocol: Tel: 0171-636 9375 Fax: 0171-636 2981
Press: Tel: 0171-636 0380 Fax: 0171-636 5578
Administration: Tel: 0171-636 8845 Fax: 0171-636 2981
Consular: Tel: 0171-636 5637 Fax: 0171-636 9756
Visa: Tel: 0891-880 808 or 0171-631 1430 Fax: 0171-636 9756

EMBAJADA DE COLOMBIA

3 HANS CRESCENT, LONDON SW1X 0LN
TEL: 0171-589 9177 FAX: 0171-581 1829

London, June 24 1998

E-1384

Mrs
CAROLINE JACKSON
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol

Dear Mrs Jackson:

Further to your letter dated June 19th, in which you asked some information regarding the status conferred by Colombia to the Palestinian Liberation Organisation, I am pleased to provide you with the following information that the Ministry of Foreign Affairs has send to us.

1. Colombia has sustained a firm position of support to the Palestinian right of having an own State. This position goes back to 1947 when the General Assembly of the United Nations settled Resolution Number 181, in which the partition of Palestine was approved. From then, in the United Nations Colombia has supported Palestinian speakers and has voted in favour of Palestine for the approval of Resolutions on the conflict.

2. The premises of Colombian Foreign policy regarding the Palestinian issue have been:

a. The acknowledge of the right of the Palestinian people to have their own homeland and to live in peace;
b. The recognition of the right of the State of Israel to exist and to have guarantees for its security;
c. The impossibility of reaching the peace in the Middle East without giving an adequate solution to the Palestinian issue;
d. The reject to all kind of actions against civil population;
e. The support to the Peace Conference for the Middle East in the framework of the UN;
f. The support to the Peace Process as result of the Madrid Agreement in December 1991.

EMBAJADA DE COLOMBIA

3 HANS CRESCENT. LONDON SW1X 0LN
TEL: 0171-589 9177 FAX: 0171-581 1829

3. In the XI Summit of the Non - Aligned Movement held in Cartagena in October 1996, Presidents Samper and Arafat agreed to exchange Ambassadors. In April 1996, it was authorised the opening of a Palestinian Special Mission in Colombia, with Ambassador Sabri Ateyeh as Head of Mission. On the other hand, Colombia has designated Jaime Girón Duarte, currently the Colombian Ambassador in Egypt, as Ambassador Non Resident to the National Palestinian Authority.

I hope you will find this information useful. If you have further questions do not hesitate to contact us.

Sincerely yours,

CARLOS LEMOS-SIMMONDS
Ambassador

AR

CYPRUS HIGH COMMISSION
93, PARK STREET,
LONDON W1Y 4ET
Tel: 0171-499 8272
Fax: 0171-491 0691 / 0171-491 2955

Our Ref.: INT.A.80

Ms Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol, BS8 1RJ

23 July, 1998

Dear Ms Jackson,

Further to our letter dated 13 July 1998, I am writing now to confirm that Cyprus conforms in general with the policy of the European Union, as far as the international representation of the Palestine Liberation Organization is concerned. Cyprus also conforms with the same policy concerning the role of the P.I.O. in its efforts to gradually reconstruct the territories handed back within the peace process, also the ones that it is hoped will be handed back in the near future, into a modern state.

The Republic of Cyprus supported and continues to support the alienable right of the Palestinian people to self-determination and it is hoped that the implementation of this right will allow the Palestinian people to create a modern, independent and sovereign Palestinian State.

Needless to say, the Republic of Cyprus supported and continues to support the right of Israel to exist within internationally recognised borders. It is a well known fact that Cyprus has full diplomatic relations with the State of Israel since its creation and retains friendly relations on both the bilateral and international level.

Yours sincerely,

George Kasoulides
Deputy High Commissioner

KONGELIG DANSK AMBASSADE
London

55 Sloane Street
London SW1X 9SR
Tlf. +44 171 333 0200
Fax +44 171 333 0270
Telegr. Adr. Ambadane, London
Direkte nr. +44 171 333 02 □ □

University of Bristol
Att. Caroline Jackson
Department of Law
Wills Memorial Building
Queens Road,
Bristol BS8 1RJ

Encl.

Reference
5.C.10

Date
23 June 1998

Dear Ms Jackson,

With reference to your letter of 21 May 1998 concerning information on the status accorded to the Palestine Liberation Organisation by the Government of Denmark I can inform you that The Palestine Liberation Organisation has not been recognized by the Danish Government. Nor does the Danish Government regard the PLO as the sole legitimate representative of the Palestinian people.

Official contacts to the Palestinian authorities are conducted through an office entitled "The Palestinian General Delegation to Denmark". The office does not rank as an Embassy but enjoys certain privileges such as VAT and tax exemption, flying the Palestinian flag, and is included in the Danish Diplomatic List under "Other Missions".

I trust this clarifies the Danish position with regard to the PLO and remain,

Yours sincerely,

Helle Dueholm
1st Secretary

OFFICE OF THE AMBASSADOR
FOR THE COMMONWEALTH OF DOMINICA

1 COLLINGHAM GARDENS
LONDON SW5 0HW

TELEPHONE
0171-370 5194-5
FAX
0171-373 8743

14 September, 1998

Ms. Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
BRISTOL BS8 1RJ

Dear Ms. Jackson,

Re: The Status Accorded to the Palestine Liberation Organisation by the Government of the Commonwealth of Dominica

I am now able to reply to your earlier correspondence on this matter, and to confirm that the Government of the Commonwealth of Dominica has not as yet expressed a formal position regarding the Palestinian Liberation Organisation.

However, in a message dated 22 November, 1994, from the Minister of External Affairs of Dominica, addressed to the PLO, the Minister wrote as follows:

> "We emphasise our continuing support for progress in the peace negotiations and in the progressive realisation and development of the legitimate aspirations of the Palestinian People towards full nationhood".

I hope you find this information useful.

Yours sincerely,

GEORGE E. WILLIAMS
HIGH COMMISSIONER

GEW/jc

EMBAJADA DEL ECUADOR
LONDRES

Ms Caroline Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol, BS8 1RJ

22 July 1998

Dear Madam,

Regarding your letter dated 19th June 1998, please find enclosed a copy of the information received from the Ministry of Foreign Affairs in reference with the status accorded to the Palestine Liberation Organization by the Ecuadorian Government.

We hope that the information provided was of any use to you.

Yours sincerely,

Helena Yánez-Loza
Counsellor

Flat 3b, 3 HANS CRESCENT, London SW1X OLS Tel: 0171 584 1367 Fax: 0171 823 9701

FECHA: QUITO, 1 DE JULIO DE 1998

REF. SU CE 161/98

ASUNTO: RECONOCIMIENTO OTORGADO A LA OLP.

CON EL PROPOSITO DE QUE PUEDA ATENDER LA CONSULTA FORMULADA POR LA DOCTORA CAROLINE JACKSON, INVESTIGADORA DE LA UNIVERSIDAD DE BRISTOL, INFORMO A USTED LO SIGUIENTE:

"CON OCASION DE LA SUSCRIPCION POR EL ESTADO DE ISRAEL Y LA ORGANIZACION PARA LA LIBERACION DE PALESTINA, EN WASHINGTON, EL 13 DE SEPTIEMBRE DE 1993, DE INSTRUMENTOS MEDIANTE LOS CUALES SE RECONOCIERON MUTUAMENTE Y CONVINIERON EN ESTABLECER UN REGIMEN DE AUTONOMIA PALESTINA EN
LA FRANJA DE GAZA Y EN JERICO, EL GOBIERNO DEL ECUADOR EXPRESO SU BENEPLACITO ANTE ESTE ACONTECIMIENTO QUE SIGNIFICA NO SOLAMENTE EL COMIENZO

DE LA SUPERACION DEL CONFLICTO QUE POR TANTOS AÑOS HA ENSANGRENTADO A PALESTINOS E ISRAELITAS, SINO LA APARICION DE UNA NUEVA ERA EN LAS RELACIONES DE LOS PUEBLOS DEL MEDIO ORIENTE, Y FORMULO VOTOS POR LA FELIZ CULMINACION DE ESTE PROCESO HISTORICO QUE REDUNDARA EN EL FORTALECIMIENTO
DE LA AMISTAD Y COOPERACION NECESARIOS PARA LOGRAR EL DESARROLLO INTEGRAL
DE LOS PAISES DE ESA REGION Y EL AFIANZAMIENTO DE LA PAZ EN EL MUNDO.

EL ECUADOR HA MANTENIDO UNA POLITICA DE RESPALDO A LA LEGALIDAD DE LA RESOLUCION ADOPTADA POR LA ASAMBLEA GENERAL DE LAS NACIONES UNIDAS EL
28 DE NOVIEMBRE DE 1947, REFERENTE A LA PARTICION DEL TERRITORIO PALESTINO BAJO MANDATO BRITANICO EN FAVOR DE ESTA DECISION QUE EN LA PRACTICA DIO ORIGEN AL ESTABLECIMIENTO DEL ESTADO DE ISRAEL, EL 14 DE MAYO DE 1948.

NUESTRO PAIS HA DESARROLLADO CON EL ESTADO JUDIO LAS MAS ESTRECHAS Y MUTUAMENTE BENEFICIOSAS RELACIONES DE AMISTAD Y COOPERACION,
MAS ESTAS VINCULACIONES NO HAN OBSTADO PARA QUE APOYE TRADICIONALMENTE EN
TODOS LOS FOROS INTERNACIONALES EL DERECHO DE AUTODETERMINACION DEL PUEBLO
PALESTINO DE CONSTITUIR UN ESTADO ARABE EN PARTE DEL TERRITORIO DEL ANTIGUO MANDATO BRITANICO EN LA PALESTINA, DE SER ESA SU VOLUNTAD.

DENTRO DE ESTE MARCO JURIDICO, EL GOBIERNO ECUATORIANO TRADICIONALMENTE HA RESPALDADO TODAS LAS GESTIONES ENCAMINADAS A LA SOLUCION GLOBAL Y DEFINITIVA DEL CONFLICTO ENTRE ISRAEL Y PALESTINA MEDIANTE LOS METODOS PACIFICOS CONSIGNADOS EN LA CARTA DE LAS NACIONES UNIDAS Y CON SUJECION A LAS RESOLUCIONES DEL CONSEJO DE SEGURIDAD REFERENTES A LA CUESTION PALESTINA, NUMEROS 242 DE 22 DE NOVIEMBRE DE 1967 Y 338 DE 22 DE OCTUBRE DE 1973.

EL RECONOCIMIENTO RECIPROCO ENTRE EL ESTADO DE ISRAEL Y LA ORGANIZACIÓN PARA LA LIBERACIOND DE PALESTINA Y EL ACUERDO ALCANZADO PARA
ESTABLECER UN REGIMEN PROVISIONAL DE AUTONOMIA EN LA FRANJA DE GAZA Y EN JERICO, EL 13 DE SEPTIEMBRE DE 1993, SEÑALAN LA VOLUNTAD DE AMBAS PARTES DE INICIAR UN NUEVO PROCESO HISTORICO DE NEGOCIACIONES DIRECTAS QUE LAS PODRIA
CONDUCIR NO SOLAMENTE A LA SOLUCION DE LA CUESTION PALESTINA SINO A UN ARREGLO GLOBAL DEL CONFLICTO ARABE-ISRAELI Y A LA INSTAURACION DE UNA PAZ JUSTA EN EL MEDIO ORIENTE."

MUY ATENTAMENTE,

DGAO.CAN.CE

Date: Thu, 28 May 1998 18:08:20 +0300
From: "[iso-8859-1] Kõrt Juhasoo" <kart@estonia.gov.uk>
To: "'c.m.jackson@bristol.ac.uk'" <c.m.jackson@bristol.ac.uk>
Subject: PLO

[The following text is in the "iso-8859-4" character set]
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Dear Ms Jackson,
I hope that those few lines would be more or less an answer to your questions. You are always welcome to contact us again.
• Estonia recognises states that respond to the most common criteria of statehood, PLO is not recognised as such.
• PLO is regarded by Estonia as an organisation that has internationally recognised mandate to represent Palestinians. There is no visible alternative at present to the PLO.
• We communicate with PLO through their legal representations at the UN and in Helsinki.

MINISTRY FOR FOREIGN AFFAIRS OF FINLAND/
Office for Asia, Middle East, Africa and Latin America
Laivastokatu 22
00160 Helsinki

June 11, 1998

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 IRJ

Dear Ms. Jackson

With reference to your letter of May 21, 1998 requesting the information about the status accorded to the Palestine Liberation Oraganisation by the Government of Finland I wish to inform you about the following:

The PLO established a representation in Finland called The PLO Information Office in 1984. In 1993 it was closed down, but was reopened in 15.8.1995 with the name The Palestinian General Delegation to represent in Finland the interests of the Palestinian people. It does not have a diplomatic status, but in 1997 it was added in the Helsinki Diplomatic Corps and Consular list under the title: "other entities". The Head of the Delegation is also included on the quest list for the Independence Day Seremonies hosted by the President of the Republik for the Diplomatic Corps.

Finland regards PLO as a significant representative of the Palestinian people. Finland does not formally recognise organisations or governments but only states. With the other EU-states, Finland has lined up with the EPC declaration of Venice (1980) and the conclusions of Amsterdam European Council (1997), where it is stated that the Palestinian people must be placed in a position to exercise fully their right to self-determination. The conclusions of Luxembourg (1997) state, that EU is ready to contribute to Permanent Status negotiations including possible Palestinian statehood. These conclusions have their basis on UN resolution 242.

Yours Faithfully

Eevamaija Paljakka

Eevamaija Paljakka

Botschaft
der Bundesrepublik Deutschland
Embassy
of the Federal Republic of Germany

London, 7 July 1998

Direct Line: 0171-824 13 17

Gz.: Pol 320.00 PSE
(Please quote)

Kö/sm

Mrs. Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol BS8 1RJ

Dear Mrs Jackson,

with regard to the questions in your letters of 21 May 1998 and 19 June 1998, I can give you the following answers:

1. The Federal Republic of Germany has not recognised the PLO, as, in principle, only states are recognised. However, there have been contacts at working level. A "Palestine Information Centre" registered as a private-law society in Bonn, which on 16 December 1993 was converted into the "Palestinian General Delegation" (head: Abdallah Frangi). The General Delegation is listed in the list of foreign missions present in Germany under the heading "other missions", but (like its head) it does not possess diplomatic status, although it can hoist the Palestinian flag.

2. As the PLO has not been recognised, the type of recognition does not apply.

3. The Federal Republic of Germany acts according to the principle that peoples determine themselves who their legitimate representatives are. The Federal Republic of Germany bases its relations to the Palestinian territories on the Washington Interim Agreement of 28 September 1995. This includes the provisions that

   - Israel shall conclude agreements with the PLO as "the representative of the Palestinian people";
   - the PLO "may conduct negotiations and sign agreements with states and international organisations for the benefit of the (Palestinian) Council".

address:
23 Belgrave Square/Chesham Place
London
SW 1X 8PZ

telephone:
0171 824 1300

telefax
0171 824 14 35

Thus the EC concluded, among others, an interim agreement on trade matters "with the PLO for the benefit of the Palestinian authority for the West Jordan territory and the Gaza Strip" in 1997. Germany too concludes its intergovernmental agreements with the Palestinian side (e.g. on technical and financial cooperation) under this formulation.

I hope that these answers are useful for your research.

Yours sincerely

Ute König

Ute König
Political Counsellor

APOSTOLIC NUNCIATURE

54 PARKSIDE
LONDON, SW19 5NE
TEL.: 0181-946 1410
FAX.: 0181-947 2494

Prot No 983/98

London 8th September 1988

Dear Miss Jackson,

Your letter dated the 8th July was received together with the copy of the letter dated the 8th June in which you ask for information about the status that may have been given to the Palestinian Liberation Organisation by the Holy See. The question was referred to the appropriate department in the Vatican and they have sent an unofficial comment (enclosed).

With every good wish
Yours faithfully
+ Pablo Puente

Archbishop Pablo Puente
Apostolic Nuncio

Miss Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

enclosure

Caroline Jackson

Commento non ufficiale alle tre questioni poste con lettera

dell'8 giugno 1998

1. La Santa Sede ha riconosciuto e riconosce l'OLP, nella sua qualità di rappresentante del Popolo Palestinese.

Più che di un preciso atto giuridico si è trattato di un percorso, durante il quale la Santa Sede, come la maggior parte dei Paesi del mondo, ha preso atto di una duplice realtà: lo sviluppo, nello stesso Popolo Palestinese, di una coscienza di popolo e l'emergere di una organizzazione e dei relativi leaders, particolarmente rappresentativi.

Un primo gesto significativo si può registrare il 15 settembre 1982, quando il Papa Giovanni Paolo II concesse la prima udienza al Sig. Yasser Arafat.

La prima dichiarazione ufficiale della Santa Sede circa l'OLP, in quanto rappresentante del Popolo Palestinese, è datata 25 ottobre 1994, quando, con una dichiarazione congiunta, la stessa OLP e la Santa Sede hanno concordato l'apertura di un Ufficio dell'OLP presso la Santa Sede, con un suo proprio Direttore.

Tale Ufficio risulta nella Lista Diplomatica della Santa Sede, tra le Missioni a carattere speciale.

2. La Santa Sede, come gran parte della Comunità internazionale e lo stesso Stato di Israele, ritiene che l'OLP abbia ricevuto dalla comunità internazionale e dagli Accordi firmati con Israele dopo la Conferenza di Madrid e controfirmati dagli USA, Russia ecc..., una sorta di personalità giuridica internazionale con capacità di operare internazionalmente in quanto rappresentante del Popolo Palestinese e a beneficio della costituita Autorità Palestinese.

Il riconoscimento è all'OLP in quanto organizzazione.

3. Quanto sopra affermato significa che all'OLP è riconosciuta la rappresentatività del Popolo Palestinese e la capacità di esercitarla legittimamente.

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 IRJ

London May 29, 1998

Dear Dr. Jackson,

With reference to your letter dated May 21, 1998 enquiring about the status accorded to the PLO by the Government of the Republic of Hungary I should like to inform you as follows.

The Government of Hungary / then the Hungarian People's Republic / recognized the PLO as a liberation movement throughout the 1960s, 70s and 80s . The Government however had relations with several other Palestinian organizations as well.

In 1988 the Government of Hungary / still the Hungarian People's Republic / established diplomatic relations with the PLO at ambassadorial level after having acknowledged the statement of the Palestinian National Council on the Declaration of the State of Palestine on November 15, 1988. The representation of the PLO in Budapest is officially called "The Embassy of the State of Palestine". This does not however equal to the recognition of the State of Palestine.

At present the Hungarian authorities keep contact with the Palestinian National Authority through the Hungarian Embassy in Tel Aviv.

Hoping that you will find this information satisfactory,

Yours sincerely,

J. Szabo

Jozsef Szabo
Counsellor
Embassy of the Republic of Hungary
35 Eaton Place
London SW1X 8BY

Tel: 0171-235-52 18

EMBASSY OF THE REPUBLIC OF INDONESIA
LONDON

048/VI/07/Lon/98

Ms. Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol BS 1RJ

17 July 1998

Dear Ms. Jackson,

With reference to your letter of May 21 and June 19, I would like to submit answers to your questions on Indonesia's position regarding the PLO as follows :

1) Indonesia recognised PLO as a liberation movement. We do not have the date of recognition for PLO as a liberation movement, however, the Indonesian Government has recognised the Palestinian State on 16 November 1988, a day after the establishment of a Palestinian State was proclaimed by the PLO on 15 November 1988.

2) Indonesia also recognised PLO as the sole legitimate representative of the Palestinian people.

I hope that this information would be of assistance to your study.

Sincerely yours,

Sunten Z. Manurung
Head of Political Department
Indonesian Embassy

38 Grosvenor Square, London W1X 9AD United Kingdom
Phone 0171 499 7661 Fax 0171 491 4993 Telex 28284

OIFIG AN AIRE GNÓTHAÍ EACHTRACHA
OFFICE OF THE MINISTER FOR FOREIGN AFFAIRS

BAILE ÁTHA CLIATH 2
DUBLIN 2

Tel: 353 1 4082178
(helen.callanan@iveagh.irlgov.ie)

Ms Caroline M Jackson
Department of Law
University of Bristol/Wills Memorial Building
Queens Road
Bristol BS8 1RJ
United Kingdom

24 July 1998

Dear Ms Jackson,

Further to your enquiry regarding the diplomatic representation of the Palestinian Liberation Organisation, the PLO representative to Ireland is resident in London. The status of the Palestinian representative to Ireland, Dr Yousef Allan, is Delegate-General of Palestine. Dr Allan's status was determined by Government decision S26358 of 14 December 1993. This decision approved the establishment of a resident Israeli Embassy in Dublin and said that the PLO should be invited to establish a Palestinian delegation in Dublin.

It was decided to afford the Palestinian delegation official status in the following manner:

- The title of office would be Delegate-General of Palestine
- No diplomatic immunities would be offered to the office as there was no legislative basis to govern such a case.
- Certain limited privileges would be granted to the office, such as duty free import of vehicles.
- As the PLO was not a state the presentation of credentials was not thought appropriate. Therefore, upon nomination by the PLO, and following approval by the Minister, the PLO would submit to the Minister a formal letter confirming the agreed nominee as Delegate-General of Palestine.
- The Palestinian office, and its accredited official, would appear in the final section of the Diplomatic List.

Dr Allan is resident in London and the PLO have not yet taken up the invitation to establish a Delegation Office in Ireland due to insufficient financial resources. There was previously, from 1985-1991, a Palestine Information Office in Dublin which was closed for financial reasons. It had not been afforded any form of official status.

If you have any further queries please contact us.

Yours sincerely

Helen Callanan

Helen Callanan
Middle East Section - Department of Foreign Affairs

EMBASSY OF ISRAEL
2 PALACE GREEN
LONDON, W8 4QB

Telephone: 0171-957 9500
Fax: 0171-957 9555

e-mail: isr-info@dircon.co.uk
Internet: http://www.israel-embassy org.uk/london/

שגרירות ישראל
לונדון

June 9th 1998

Ms Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Ms Jackson,

Thank you very much for your letter of May 21st, enquiring about the legal status of the PLO.

I enclose a copy of the Peace Accords that are the legal basis for the Peace Process, and I hope that you will find the information that you need in those documents.

If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely,

Paul Neville

Paul Neville
Public Affairs Officer

WITH BEST WISHES

EMBASSY OF THE REPUBLIC OF KOREA

60 BUCKINGHAM GATE

LONDON SWIE 6AJ

Ms Caroline Jackson, LL.B., LL.M.
Department of Law,
University of Bristol,
Wills Memorial Building,
Queens Road,
Bristol,
BS8 1RJ.

26th May, 1998

Dear Ms Jackson,

Re: The Status Accorded to the PLO by the Government of the Republic of Korea

The Government of the Republic of Korea recognised that the PLO solely represents the Palestinian people in 1995.

Please note that the above recognition is not equivalent to recognition as a state or government.

Yours sincerely,

Lee Jong-kug
First Secretary

EMBASSY OF LEBANON
LONDON

سفارة لبنان
لندن

Mrs. Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

tel: 01-1 229 7265

London, 16 June 1998

Dear Mrs. Jackson,

With reference to your letter dated 21 May concerning the status accorded to the Palestine Liberation Organization by the Government of Lebanon, kindly take note that your letter has been forwarded to the Ministry for Foreign Affairs. Their reply letter reference no. 3301/4 dated 13th June, is that you may consult other political and legal publications concerning that matter and that the Office of the Palestine Liberation Organization in London may better qualified than the Lebanese Ministry for Foreign Affairs to answer some of the specific points raised in your research especially because of their legal nature.

Sincerely yours,

Information Office
Embassy of Lebanon
21 Kensington Palace Gardens
London W8 4QN

Principality of Liechtenstein

Office for Foreign Affairs

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
GB - Bristol BS8 1RJ

Vaduz, 16 July 1998
9202.3

Re: The Status Accorded to the Palestine Liberation Organization

Dear Ms. Jackson,

With reference to your letter dated 18 June 1998 concerning the position of the Liechtenstein Government regarding the Palestine Liberation Organization I can give you the following information:

Liechtenstein has never officially recognised the Palestine Liberation Organization. However, within the framework of its membership of the United Nations, Liechtenstein has voted on resolutions of the General Assembly referring to the Palestine Liberation Organization, most recently on resolution A/52/l.53/Rev.2 entitled „Questions of Palestine". Furthermore, Liechtenstein has signed the „Declaration by the EFTA States and the Palestine Liberation Organization (PLO) for the Benefit of the Palestinian Interim Self-Government Authority of the West Bank and Gaza Strip" of 16 December 1996 by which the willingness to establish an interim free trade agreement taking into account the provisions of the WTO is expressed.

Hoping that this information will be of use, I remain

yours sincerely,

Daniel Ospelt, Vice-Director

Heiligkreuz 14 FL-9490 Vaduz Telephone 075 236 60 58 Telefax 075 236 60 59

Embassy of the Republic of Macedonia
London

10 Harcourt House
19a Cavendish Square
London W1M 9AD

Tel: 0171-499 5152
Fax: 0171-499 2864

Ref.No.459/P/98

August 20, 1998

Ms Caroline M. Jackson
Department of Law
University of Bristol

Dear Ms Jackson,

Thank you very much for your letter of June 8, 1998.

Concerning your interest about the status accorded to the PLO by the Government of the Republic of Macedonia we would like to inform you the following:

1) The Republic of Macedonia has never recognised the PLO.

2) None

3) The Republic of Macedonia regards the PLO as the sole legitimate representative and Mr. Jaser Arafat as a Chairman of the Executive Committee of the PLO.

Yours sincerely,

Counsellor,
Radika Sekulovska

AMBASSADE
DE LA REPUBLIQUE DE MADAGASCAR
EN FRANCE

4, Avenue Raphaël - 75016 PARIS
Tél : 01.45.04.62.11

Paris, le 25 AOUT 1998

N°2184/AMB/PA/PC

Mademoiselle Caroline M. JACKSON
Département of Law
Wills Memorial Building
Queens Road
The University of Bristol
B 58 1RJ - ROYAUME UNI

OBJET : Position de Madagascar vis-à-vis de l'OLP.

Mademoiselle,

Faisant suite à votre lettre en date du 1er Juin 1998 relative à l'objet libellé en rubrique, j'ai l'honneur de vous faire connaître que MADAGASCAR reconnaît l'OLP en tant que Mouvement de Libération et le considère comme le seul représentant du Peuple Palestinien.

Restant toujours à votre entière disposition, je vous prie d'agréer, Mademoiselle, l'assurance de mes salutations distinguées.

Le Premier Conseiller

AMBASSADE DE LA REPUBLIQUE DE MADAGASCAR
REPOBLIKAN'I MADAGASIKARA
EN FRANCE

Eloi A. Maxime DOVO

بسم الله الرحمن الرحيم

HIGH COMMISSION OF MALDIVES

TEL: (0171) 224 2135
TELEX: 921 494 MALDI G
FAX: (0171) 224 2157

22 NOTTINGHAM PLACE
LONDON W1M 3FB

12 August 1998

Ref. No. 139/MIS/98/46

Ms. Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol
BS8 1RJ

Dear Ms. Jackson,

The Status Accorded to the Palestine Liberation Organization by the Government of the Maldives

Thank you for your letter of 8 June 1998 and 8 July 1998 regarding the above subject.

I wish to inform you that the Government of Maldives recognised that the PLO is the legitimate representative of the Palestine People and established diplomatic relations with the PLO on 4th April 1982. The Maldives recognised the State of Palestine shortly after it was proclaimed.

Having maintained diplomatic relations, the Government of Maldives enjoys close ties with the State of Palestine.

Yours sincerely,

Abdulla Maseeh Mohamed
Second Secretary

MINISTERU
TA' L-AFFARIJIET BARRANIN
U L-AMBJENT

MALTA

MINISTRY
OF FOREIGN AFFAIRS
AND THE ENVIRONMENT

Our Ref: MFA/UN/689

22 July 1998

Ms Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 IRJ
United Kingdom

Dear Ms Jackson,

I wish to refer to your letter dated 21 May 1998, concerning the status accorded to the Palestine Liberation Organisation by the Government of Malta, which letter was brought to my attention through the Malta High Commission in London.

With a view to assist you in your study and research on what is the status of the PLO in international law, I wish to submit the following information.

The Government of Malta on 16 November 1988, had issued a declaration by which it reaffirmed its recognition of the right of the Palestinian People to a State of their own. Malta also welcomed the Declaration of Independence made in Algiers on 15 November 1988, and acknowledged this Declaration as a true and genuine expression of the right of the Palestinian People to a State of their own.

With respect to your first and third questions regarding the recognition of the PLO, the Maltese Government had since the 1970s recognised the PLO as the sole and legitimate representative of the Palestinian People.

Regarding your second question, the Government of Malta has not declared itself on the matter.

Yours sincerely,

Saviour F. Borg
Director Multilateral Affairs

PALAZZO PARISIO, MERCHANTS STREET, VALLETTA
TELEPHONE: 242505; 242853 FAX: 237822

Republic of the Marshall Islands

Permanent Mission to the United Nations

220 East 42nd Street, 31st Floor • New York, New York 10017
Tel. (212) 983-3040 • Fax. (212) 983-3202

Caroline M. Jackson, Dept. of Law
University of Bristol
Wills Memorial Building
Queens Road, Bristol BS8 1RJ
United Kingdom

June 16, 1998

Dear Ms. Jackson,

Thank you for your letter of June 8, 1998 regarding the position of the Republic of the Marshall Islands vis-à-vis the Palestine Liberation Organization. In response to your questions I can inform you of the following:

1. The Republic of the Marshall Islands has not formally recognized the PLO, nor have diplomatic relations been established. However, the Government of the Republic of the Marshall Islands issued a declaration on the day of the Washington Ceremony welcoming these developments. This was reiterated by the Minister of Foreign Affairs and Trade in his speech that year to the United Nations General Assembly.

2. The Republic of the Marshall Islands has not given any particular designation of a formal nature to the PLO. However, Government Officials have referred to it as an Authority in official statements.

3. The Republic of the Marshall Islands does not accord any other Palestinian representative the status of legitimacy, and although there has been no official formal recognition, there has neither been an official rejection of the PLO as the recognized authority.

Yours sincerely

Espen Rønneberg
Minister Counsellor

MAURITIUS HIGH COMMISSION

0171-581 0294/5

Your Ref.:

Our Ref.: MHCL 726/1/02

32/33 ELVASTON PLACE
LONDON SW7 5NW

Telex No: 917772
Fax No: 0171-823 8437

25 June 1998

Ms C. Jackson
University of Bristol
Department of Law,
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Ms Jackson,

The Status Accorded to the Palestine Liberation Organisation by the Government of Mauritius

Thank you for your letter of 19 June, 1998.

I would like to inform you that we do recognise the Palestine Liberation Organisation, having an Embassy based in Tanzania which is accredited to Mauritius. I enclose copy of the entry in the Mauritius Directory of the Diplomatic Corps of October 1997.

There is no other Palestinian Organisations, except the PLO, which appears in the Directory.

I would, however, advise you to contact the Ministry of Foreign Affairs and International Trade, New Government Centre, Port-Louis, Mauritius
(Fax No: 00 230 208 8087) for further information.

Yours sincerely,

(S.Chuckowree)
for Deputy High Commissioner

EMBAJADA DE MÉXICO

— —

091436

London, September 1, 1998

Caroline M. Jackson, LL.B. (Hons.), LL.M.
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol, BS8 1RJ

Dear Ms. Jackson:

In attention to your kind letter in which you requested information on the Mexican Government's position regarding the Palestinian Liberation Organisation (PLO), I am pleased to inform you that, according to information recently provided by the Mexican Ministry of Foreign Affairs, our Government extended its recognition to the PLO on August 5, 1975, as a National Liberation movement and as the only and legitimate representative of the people of Palestine. Furthermore, the PLO maintains an information office in Mexico since 1990 and is, consequently, granted with privileges and immunities.

This Embassy hopes that the information provided would be of assistance to your interesting research, and wishes you all the success in its fulfilment.

Yours sincerely,

Santiago Oñate
Ambassador

60
CO/ELC

[redacted]

EMBASSY
of the
FEDERATED STATES OF MICRONESIA

P.O. BOX 15493, SUVA, FIJI.

YOUR REF :
OUR REF :

TELEPHONE : (679) 304566
TELEXFAX : (679) 304081

5th August, 98

Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol
BS8 IRJ

Dear Madam Jackson:

Reference is made to your inquiry concerning the status accorded to the Palestine Liberation Organization (PLO) by our Government. Please be advised that the Government of the Federated States of Micronesia has not made any determination regarding the status of the PLO.

Sincerely,

Osaia M. Santos
First Secretary

PRINCIPAUTÉ DE MONACO

SERVICE DES RELATIONS EXTÉRIEURES

DIRECTION

N° 98-1486

Le 13 JUIL. 1998

Mademoiselle,

Suite à votre lettre en date du 18 juin 1998, relative au statut accordé par Monaco à l'Organisation de Libération de la Palestine, j'ai l'honneur de vous faire savoir que la Principauté, conformément à ses usages diplomatiques, n'a jamais expressément reconnu cette Organisation.

Je vous prie d'agréer, Mademoiselle, mes salutations distinguées.

P. le Ministre d'Etat,
Le Chef de Cabinet,

Denis RAVERA

Mademoiselle Caroline JACKSON
Department of Law
University of Bristol
Wills Memorial Building

ROYAL NEPALESE EMBASSY,
12A, KENSINGTON PALACE GARDENS,
LONDON, W8 4QU

28 July 1998

Ms Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol BS8 1RJ

Dear Ms Jackson,

With reference to your letter dated 19th June, 1998, I am sending herewith Nepal's position on Palestine Liberation Organisation.

"Nepal has not officially recognised Palestine Liberation Organisation. However, Nepal's policy on Palestine is that Palestine must have their right of self determination to their homeland. Nepal considers PLO as the representative of the Liberation movement for the Palestinian people."

Yours sincerely,

P. Prasai

(Prahlad K. Prasai)
Counsellor/Deputy Chief of Mission

Ministerie van
Buitenlandse Zaken

Mevrouw Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 IRJ ENGLAND

Netherlands Ministry of Foreign Affairs
North Africa and Middle East Department
Bezuidenhoutseweg 67
Postbus 20061
2500 EB Den Haag
The Netherlands

Date 9 July 1998
Our Ref. MO-467/98
Page 1/1
Encl. *
Re your letter of 21 May 1998 requesting information

Contact drs. G. de Jong
Tel. +31 70 3485189
Fax +31 70 3486639
E-mail dam-mo@dam.minbuza.nl

Dear Ms Jackson,

Your request for information on the Dutch government's position regarding the status of the PLO has been passed to me.

Since the late seventies, the Netherlands has recognised the PLO *de facto* as a negotiating partner. In the 1980 Venice Declaration, the European Community called for the Palestinian people and the PLO to be involved in peace talks. In 1983 the PLO was given permission to open an office - without diplomatic status - in the Netherlands.

Since the signing of the Declaration of Principles in 1993, the Netherlands has recognised the PLO as the representative of the Palestinian people.

I hope to have been of service.

Yours sincerely,

G.S. de Jong
Head, Middle East Division
for the Minister for Foreign Affairs

NEW ZEALAND HIGH COMMISSION

TE AKA AORERE

LONDON

4 June 1998 156/1/1

Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
BRISTOL BS8 1RJ

Dear Ms Jackson

Thank you for your letter of 21 May requesting information about the status accorded to the Palestine Liberation Organisation by the New Zealand Government.

The Ministry of Foreign Affairs and Trade in Wellington advise that there are differences between how international law portrays the Palestine Liberation Organisation (PLO) and the body's status in a political context. Specific responses to your questions are as follows:

1) The PLO is a political entity, not a state. It is not recognised by the New Zealand Government.

2) The PLO is seen as a representative of the Palestinian people and as such the New Zealand Government has had dealings with the organisation.

3) As noted in 2) above, the New Zealand Government does not see the PLO's role as the exclusive representative of the Palestinian people. Other entities identified as representing and speaking on behalf of certain sections of the Palestinian people, but on which the Government passes no judgement, include the Palestine National Authority, the Palestine National Council, the Palestine Legislative Council and Hamas.

Yours sincerely

Gabrielle Rush
for High Commissioner

NEW ZEALAND HOUSE 80 HAYMARKET · LONDON SW1Y 4TQ
TELEPHONE 0171 930 8422 FACSIMILE 0171 839 4580

Telephone: 01-930 0922/6
Telex: 25827 KUNDU

Our Ref: LHC/POL/INFO.12

PAPUA NEW GUINEA
HIGH COMMISSION

14 Waterloo Place,
London SW1R 4AR

17th July 1998

Ms Caroline Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
BRISTOL BS8 1RJ

Dear Ms Jackson

The Status of Accorded to the Palestine Liberation Organisation by the Government of Papua New Guinea

I refer to your letter of 21st May and 19th June 1998 respectively, and apologise most sincerely for the long delay. The reason being that we had to refer your request to the appropriate authorities in Port Moresby for their advice due to very limited information available to us here. Nevertheless, I have now received a response this week and am able to response to your request.

: Papua New Guinea's official position to conducting formal relations with the Palestinian Liberation Organisation are as follows:

a) Papua New Guinea formally commenced recognition of the PLO in September 1992;
b) Formal diplomatic ties between PNG and PLO were established on 13th January 1995;
c) Papua New Guinea recognises the PLO as an emerging state;
d) Papua New Guinea Government regards the PLO as the sole legitimate representative of the Palestinian people and finally;
e) Papua New Guinea Government's current official position is that the recognition of the state of Palestine would only be accorded on the condition that the current and on-going peace negotiations between Palestinian Authorities and the Israelis is successfully concluded to the mutual satisfaction of all parties concerned.

I trust the above will satisfactorily meet your purposes.

Yours sincerely

Sir Kina Bona KBE
High Commissioner

Pasuguan ng Pilipinas *Embassy of the Philippines*

London

30 June 1998

Dear Ms. Jackson,

With reference to your letters dated 21 May 1998 and 19 June 1998, below are replies to your queries:

1. The Philippines first formally recognized the PLO on 18 November 1973, when it supported UN Security Council Resolution No. 242, dated 22 November 1967, calling for withdrawal of Israeli forces from all occupied Arab territories, and the restoration of the legitimate rights of the Palestinian people.
   In 1988, Mr. Farouk Khadoumi, Foreign Affairs Minister of the State of Palestine visited the Philippines. It was during this visit that the Philippine government allowed the PLO to open its resident mission in Manila with Hassan Hamdouna as the first Palestinian resident envoy.
2. The Philippines recognizes the PLO as a government of an emerging state. It supports the rights of the Palestinian people for self determination and the establishment of a Palestinian state, in the context of the right of all states in the Middle East to exist peacefully along guaranteed borders and to have security and economic stability.
3. The Philippines regards the PLO as the sole legitimate representative of the Palestinian people.

It is my understanding that the above information will be used as part of your study at the University of Bristol establishing the status of the Palestine Liberation Organisation in international law.

Very truly yours,

Ma. Zeneida A. Collinson
Minister-Counsellor

Ms. Caroline Jackson, LL.B. (Hons), LL. M.
Dept. of Law, University of Bristol
Bristol

AMBASADA
RZECZYPOSPOLITEJ POLSKIEJ

EMBASSY
OF THE REPUBLIC OF POLAND

47 Portland Place
London W1N 4JH

tel: 0171 580 4324
fax: 0171 323 4018

London, 25. 06. 1998 r.

Mrs Caroline M.Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol BS8 1RJ

Dear Mrs Jackson,

Thank you for your letter dated 19.06.1998.
In accordance with your request I am sending some information from the Polish Ministry for Foreign Affairs.

Yours sincerely,

Kate Brujewicz

Press & Information Office

Polish - Palestinian relations

1. Official contacts between Poland and the political representation of the Palestinian nation - Palestinian Liberation Organisation (PLO) - can be traced from the 1970s'. A PLO delegation, without a status of a diplomatic mission, has been established at the Committee for Solidarity with the Nations of Asia, Africa and Latin America. Since the very beginning of its existence, PLO has been regarded as the only representative body of the Palestinian nation. Diplomatic relations between Poland and PLO were instituted on the basis of the government decision of 22 October 1982 (after the Israeli aggression on Lebanon). The PLO delegation received a status of an official diplomatic mission, and its Head, the Ambassador, was granted the privilege of accreditation to the head of government. This state has been maintained.

Poland recognised the act of proclamation of the State of Palestine passed on 19th session of the Palestinian National Council (parliament) in Algiers on 15 November 1988 and, in the release by the Ministry of Foreign Affairs Spokesman, expressed its „willingness to undertake co-operation with the Palestinian government when it has been formed". The change of the name of the PLO delegation in Warsaw into „The Embassy of the State of Palestine" took place during Y. Arafat' s visit to Poland as a result of a one-sided Palestinian decision, acknowledged by the Polish authorities.

Y. Arafat has paid three official visits to Poland. In 1989 he was received with the honours due to a Head of State. His first contact with Poland took place in 1955 when he participated in the International Youth Festival.

In Poland, the Association for Polish - Palestinian Friendship was created, it has its Palestinian counterpart.

In the 1970s', Polish attitude towards the Palestinian issue took into account all ideological and political aspects, but simultaneously it resulted from the conviction that lasting peace and stabilisation in the Near East, in the existing realia, was impossible to be attained without granting the national aspirations of Palestinians. Poland has never questioned the Israel's right to exist securely as a state.

2. In the time between the initiation of the Near East peace process (Madrid, October 1991) and the normalisation of the PLO - Israel relations (Oslo, August 1993), our contacts with the population on the occupied territory consisted mainly in the participation of the Ambassadors of the Republic of Poland in Tel Aviv in occasional meetings organised in the Orient House for the representatives of the foreign diplomatic missions accredited to Israel.

The first official contact on ministerial level was Mr. K. Skubiszewski's- Minister for Foreign

Affairs - visit to Israel (November, 1992) where he met a group of Palestinian activists who were taking part in the Arab - Israeli negotiations in Washington. Our mission in Tel Aviv suspended its contacts with the Orient House after the Cairo agreements had been conducted between Israel and PLO (May 1994) as a result of which Palestinian autonomy began to exist. These agreements limited political activity of the autonomous authorities only to the territories under its administration. Consequently, the Israeli authorities began discouraging representatives of foreign countries from the meetings organised in the Orient House. They approved, however, of maintaining contacts with the delegations of the autonomous authorities on the territories under their administration.

3. In 1995 we began a direct political dialogue with the Palestinian autonomous authorities through the Embassy of the Republic of Poland in Cairo. On 6-12 August 1995 a special envoy was delegated by the Embassy to the Gaza Strip and the West Bank. He was received by Y. Arafat and he also contacted representatives of the Palestinian autonomous authorities. Irrespective of this, since December 1994 diplomats from the Polish Embassy in Tel Aviv, at least once a month, and sometimes more often, have paid visits to Palestinian offices in Gaza and took part in the events organised there. Our mission maintains regular contacts with the departments of Information, International Co-operation and Planning, Education and Construction, Youth and Sport, Tourism and Cultural Heritage and Labour and Social Affairs.

4. In April 1997 the Minister for Foreign Affairs appointed a contact person (a counsellor at the Embassy of the Republic of Poland in Tel Aviv) between the Polish authorities and the Palestinian Autonomy which was an official starting point for communication with the Palestinian autonomous authority. We treat these contacts mainly as an expression of our support for the Near East peace process.

By: Piotr Opaliñski
Department for Africa, Asia,
Australia and Oceania
Ministry for Foreign Affairs
Poland

EMBASSY
OF THE SLOVAK REPUBLIC
CONSULAR DEPARTMENT
25 Kensington Palace Gardens
L O N D O N W8 4QY

☎ 0171-243 0803, 0171-243 8935
Fax 0171-727 5824

London, May 25, 1998

Ms
Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
BRISTOL BS8 1RJ

Dear Ms Jackson,

refering to your letter of May 21, 1998 on the position of the Government of the Slovak Republic in the status of the Palestine Liberation Organisation we have the following answers:
1. The Government of the Czechoslovak Socialist Republic established the diplomatic relations and recognized P.L.O. on November 18, 1988. From January 1, 1993 the two independent states- the Slovak Republic and also the Czech Republic were established. From the same day, the Slovak Republic continue with contacts to the Palestine National Council, as a representative of P.L.O. The Embassy of the Slovak Republic in Tel Aviv covers the contacts to the Palestine National Council.
2. The Government of the Slovak Republic has recognised the P.L.O. as a liberation movement.
3. The Government of the Slovak regards the P.L.O. as the sole legitimate representative of the Palestine people.

For the information on the Czech side you can contact: The Embassy of the Czech Republic, 26-30 Kensington Palace Gardens, London W8 4QY.

Sincerely yours

Dr M. KLIMO
COUNSELLOR
(Consular and Legal)

VELEPOSLANIŠTVO REPUBLIKE SLOVENIJE
EMBASSY OF THE REPUBLIC OF SLOVENIA

Suite One, Cavendish Court
11-15 Wigmore Street, LONDON W1H 9LA
Tel: 0171 495 7775
Fax: 0171 495 7776

London, July 7 1998

Ms. Caroline Jackson,
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Ms. Jackson,

Re: The status of the Palestine Liberation Organisation

Thank you for your letters of May 21 and June 19 1998.

The Republic of Slovenia had recognised the PLO in 1992 as the legitimate representative of the Palestine people.

The Republic of Slovenia recognises the PLO as the legitimate but not as the only representative. Nevertheless, the Republic of Slovenia has not so far recognised any other Palestinian organisation.

Yours sincerely,

A. Brackovic (Mr)
Minister Plenipotentiary

Telephone : 0171-235 8315
Facsimile : 0171-245 6583
Telex : 51-262 564

Our Ref :

Your Ref:

SINGAPORE HIGH COMMISSION

9 Wilton Crescent
London SW1X 8SA

12 August 1998

Ms Caroline Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Dear Ms Jackson

Please refer to your letter dated 21 May 98. At the outset, I would like to apologise for this late reply.

Enclosed are some speeches and statements that would give you an idea of our position on the recognition of the PLO.

Yours sincerely

HAFIZ SAYUTI
FIRST SECRETARY

ENC

SOUTH AFRICAN HIGH COMMISSION

TRAFALGAR SQUARE LONDON WC2N 5DP
TEL: 0171 451 7299 FAX: 0171 451 7284

Direct Line : 0171-451-7165

Ref:

16 June 1998

Ms Caroline Jackson LLB (Hons), LL.M.
Department of Law
University of Bristol.
Wills Memorial Building
Queens Road
BRISTOL
BS8 1RJ

Dear Ms Jackson,

We have referred your enquiry of 21 May to the relevant desk at our Head Office and received the following reply:

"The South African Government recognises the State of Palestine as an affirmative act of diplomatic recognition, and the jurisdiction authority of the Palestinian National Authority as defined in the Oslo Accords. Additionally, the South African Government is supportive of the quest of the Palestinian people to the right of self-determination as embodied in the leading Palestinian political component, the PLO".

We hope you will find this information of use.

Yours sincerely,

W E MARX
First Secretary

SUDAN EMBASSY
LONDON

سفارة جمهورية السودان
لنـدن

25th June, 1998

Caroline M . Jackson
Department of Law,
University of Bristol,
Wills Memorial Building.
Queens Road,
Bristol BS 8 1RJ

Dear Ms Caroline,

Thank you very much for your letter dated May 21st and your reminder of 19th June, regarding the status Accorded to Palestine Liberation Organisation by the Government of Sudan.

I would like to confirm that the Sudan as well as other Arab countries has recognized the PLO. As sole and Legitimate representative of the Palestinian people. This happened in 1974 according to a solution adapted by Arab Leaders in Arab League summit in Morocco.

This was prior of Oslo accord which led to the establishment of the Palestinian National Authority under the leadership of PLO.

I hope the above mentioned information will be of any help in your research.

Thank you.

Yours Sincerely ,

Fadl Idris Fadl
For/Ambassador.

3 CLEVELAND ROW, ST. JAMES'S. LONDON SW1A 1DD TEL: 0171-839 8080 FAX: 0171-839 7560

EMBASSY OF SWEDEN
LONDON

1998-07-06

Caroline M Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Ms Jackson

Thank you very much for your letter of May 21 and June 19. We apologise for our late reply, but hope that the information below can be of help in your research.

1. The Palestine Liberation Organisation has a representation in Stockholm. It does not have diplomatic status and holds no privileges that are recognised by the Vienna Convention. It is since January 1995 referred to as The Palestinian General Delegation.

2 and 3. The Swedish Government stated already in 1976, in connection to a debate in the UN Security Council, that the Palestine Liberation Organisation was the most authoritative and representative body of the Palestinians. This is still the case and has not changed with the emergence of the Palestinian Authority which could be said to function more or less as a normal government for Palestinians in the West Bank and Gaza Strip, but which does not necessarily represent the larger Palestinian community (including the Diaspora). This is a role still played by the PLO. However, the Palestinian question is changing through a process of negotiation, and could develop into independence and finally a Palestinian state on the West Bank and Gaza Strip.

Adress	Telefonen	Ax	Telex	E-mail
11, Montagu Place LONDON W1H 2AL	+44 171 9176400	+44 171 7244174	51 28249	embassy@swednet.org.uk www.swedish-embassy.org.uk

Due to this process of change Sweden can not consider the Palestine Liberation Organisation to be the sole legitimate representative of the Palestinian people. Neither does the Swedish Government acknowledge the Palestine Liberation Organisation as a government of an emerging state.

Yours sincerely,

Per Wallén

Per Wallén
Counsellor

EIDGENÖSSISCHES DEPARTEMENT
FÜR AUSWÄRTIGE ANGELEGENHEITEN
DEPARTEMENT FEDERAL DES AFFAIRES ETRANGERES
DIPARTIMENTO FEDERALE DEGLI AFFARI ESTERI

P.279.61-2-VMA

3003 Bern, July 1st, 1998

Bitte dieses Zeichen in der Antwort wiederholen
Prière de rappeler cette référence dans la réponse
Pregasi rammentare questo riferimento nella risposta

Mrs. Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
GB - Bristol BS8 1RJ

Palestine Liberation Organization

Dear Madam,

We refer to your request of May 21st, 1998, made to our Embassy in London and forwarded to us for reasons of competence, and we would like to answer to your questions as follows:

The Swiss Government has not recognized the Palestine Liberation Organization (PLO). However, we would like to inform you that Switzerland is in a special situation regarding to the PLO.

As you certainly know, our country holds the headquarters of the United Nations Organization (UNO) in Geneva. Therefore, as the General Assembly had recognized to the PLO the right to follow the sessions as Observer, the Secretary General of the UNO asked the Swiss Government to allow the PLO to open an office in Geneva and to grant to it privileges and immunities, which were necessary to accomplish its mission in conformity with the Resolution 3237 (XXIX). In order to answer to our engagement of 1946 to facilitate the activities of the UNO in Switzerland, the Federal Council (Swiss Government) granted, on June 25th, 1975, to the office of the PLO and its non-Swiss members privileges and immunities, but only on a functional basis in order to allow the PLO to execute properly its functions in Geneva.

The title given in Geneva was at that time «Bureau d'observation de l'OLP» (Office of Observation of the PLO). Later, in December 1988, the General Assembly decided that the designation «Palestine» should be used in place of the designation «Palestine Liberation Organization». This is why the denomination in Geneva is now «Mission permanente d'observation de la Palestine auprès de l'Office des Nations Unies à Genève» (Permanent Observer Mission of Palestine to the United Nations in Geneva).

On a bilateral basis, on December 4th, 1992, the Director of the Permanent Observer Mission of Palestine to the UNO in Geneva, Mr. Nabil Ramlawi, has been appointed «Interlocuteur officiel du Département fédéral des affaires étrangères» (Official Interlocutor of the Federal Department of Foreign Affairs). Once the Palestinian Authority was established, he presented, on September 21st, 1994, to the Head of the Federal Department of Foreign Affairs, the Federal Counsellor Mr. Flavio Cotti, his «lettres de cabinet» as «Délégué général de Palestine» (General Delegate of Palestine) in Switzerland. The privileges and immunities accorded to this Delegation and its members remained the same, that is to say only functional ones, and no office has been opened in Bern.

We can also add that in the protocol order the «General Delegation of Palestine» is placed at the end.

In conclusion, it is true that Switzerland considered at that time the PLO as the greatest Palestinian organization, however this did not give to it the lawfulness to be recognized as such, especially considering the fact that Switzerland only recognizes States. This statement remains for the Palestinian Authority which does not yet represent a State.

Yours sincerely,

DIRECTORATE OF PUBLIC
INTERNATIONAL LAW
b.o.

(Evelyne Gerber)

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UNIVERSITY OF BRISTOL

Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Tel: 0117 9288991

May 21, 1998

The Director of Legal Affairs
Tanzania High Commission
43 Hertford Street
London
W1Y 7TF

Dear Sir or Madam

Re: The Status Accorded to the Palestine Liberation Organisation by the Government of Tanzania

I am a researcher in the field of public international law at the University of Bristol and am currently conducting a study establishing what the status of the Palestine Liberation Organisation is in international law.

In order to do this effectively I need to gather information directly from governments as to their position regarding the Palestinian Liberation Organisation. It would therefore assist me greatly if you would be kind enough to reply to me and supply me with the following information regarding the position of your government.

1) Whether your government has recognised the Palestinian Liberation Organisation and the date of recognition. From the day of its inception

2) What your government has recognised the Palestine Liberation Organisation as. (i.e.: as a liberation movement, a government in exile, a government of an emerging state.)

3) Whether your government regards the Palestinian Liberation Organisation as the sole legitimate representative of the Palestinian people. If your government does not then I would be grateful if could please tell me if there is an alternative body which is recognised as such

I would like to take this opportunity to thank you in advance for your co-operation in this matter. I look forward to hearing from you.

Yours faithfully

Caroline Jackson, LL.B. (Hons), LL.M.

TANZANIA HIGH COMMISSION

☎: : 0171-499 8951
Fax: 0171-491-9321
Telex: 262504 TANLDN G
E-✉: tanzarep@demon.co.uk
ALL correspondence must be addressed to H. E. The High Commissioner, ONLY.

43 Hertford Street,
London W1Y 8DB.

Please quote Ref. No. TZL/I.50/2

6th July 1998

Ms Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
BRISTOL BS8 1RJ

Dear Caroline,

Thank you for your letter dated 19 June 1998 on the status of the Palestine Liberation Organisation. This is to inform you that The Government of the United Republic of Tanzania accords PLO the status an organisation/party in power. The PLO offices in Tanzania are accorded full diplomatic status.

I hope this brief outline answers your question. Should you need further clarification, please get in touch with the undersigned.

Simba A. Mbenna
for **HIGH COMMISSIONER.**

THE ROYAL THAI EMBASSY,
30, QUEEN'S GATE,
LONDON, SW7 5JB.

No. 02/1548

14 July 1998

Dear Ms Caroline Jackson,

With reference to your letters dated 21 May and 19 June 1998 enquiring about the relations between the Government of Thailand and the Palestinian Liberation Organisation, I wish to state the following :

1. The Government of Thailand has recognised the PLO as a liberation movement and as the sole legitimate representative of the Palestinian people since 1974 but has yet to recognise Palestine as a sovereign state ;

2. Since 1974, the Government of Thailand has supported the right of self determination of the Palestinian people and the acquisition of their motherland ;

3. In 1996 when Mr Arafat was elected the President of Palestinian National Authority (PNA), His Excellency Mr Banharn Silpa-archa, the then Prime Minister of Thailand conveyed his congratulatory message to him through the Thai Permanent Mission in New York which is our official contact channel with PNA.

I very much hope that the above-mentioned information could be useful to you and your research in particular.

Yours sincerely,

(Songphol Sukchan)
First Secretary

Ms Caroline Jackson,
Department of Law,
Wills Memorial Building,
University of Bristol,
Queens Road,
Bristol BS8 1RJ

TÜRKMENISTAN ILÇIHANASY

EMBASSY OF TURKMENISTAN

Caroline M. Jackson
Department of Law
University of Bristol
Queens Road
Bristol BS8 1RJ

14 July 1998

Dear Ms Jackson

I refer to your letter of 8 July 1998. Please find the information requested.
Turkmenistan and Palestine established diplomatic relations on 17 April 1992.
Taking into consideration the fact that on 14 November 1974 the UN General Assembly recognized the Palestine Liberation Organisation as the sole legitimate representative of the Palestinian people, the Government of Turkmenistan considers the PLO and the Palestine National Autonomy formed by it as the sole legitimate representative of the Palestinian people.

With best regards,

Serdar Byashimov
Deputy Head of Mission

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Tuvalu Consulate
Tuvalu House
230 Worple Road,
London SW20 8RH

9th July 1998

Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol
BS8 1RJ

Dear Caroline Jackson,

Thank you for your letter of 8th July 1998, and my apologies for a delay in replying to your earlier communication of 8th June.

I am pleased to inform you that:

1. The government of Tuvalu does not recognise the Palestinian Liberation Organisation.
2. The government, however, recognises the emerging State of Palestine and the PLO as a government of that State.
3. The Government of Tuvalu does not recognise PLO as the sole legitimate representative of the Palestinian people. It does, however, recognise PLO as the legitimate representative of the present Government of the Palestinian State.

Yours sincerely,

I.A. Ayaz, OBE
Consul of Tuvalu

Embassy of Ukraine
in the United Kingdom of Great Britain and Northern Ireland

78 Kensington Park Road, London W11 2PL.
Tel: 0171-727 6312 Fax: 0171-792 1708

Mrs Caroline M.Jackson

Department of Law
Wills Memorial Building
University of Bristol
Queens Road
Bristol, BS8 1RJ

KB/98-222

16 July 1998

Dear Mrs Jackson,

Re: The Status of the Palestine Liberation Organisation

I refer to your letter of 8th July 1998.

Please be advised that Ukraine considers that the Palestinian people due to historical circumstances has its specific political, economic and cultural interests. Ukraine from the first day of its Independence recognises PLO de facto as ***the sole representative of the Palestinian people irrespective of the place of residence.***

The recognition of the Palestine Liberation Organisation as such does not demand according to the Ukrainian legislation the adoption of the special legal act of its confirmation.

If you have any questions, please do not hesitate to contact me.

Yours sincerely,

O.Kulakov
Consul

Embassy of the
UNITED ARAB EMIRATES
London

سفارة
دولة الامارات العربية المتحدة
لندن

Caroline M. Jackson
Department of Law
Wills Memorial Building
University of Bristol
Queens Rd.
Bristol
BS8 1RJ

24/06/98

Dear Ms. Jackson,

Thank you for your letter of 19th June. I am enclosing the following items:

1. UAE yearbook, which is quite a good document, it contains a separate chapter on foreign policy and Middle East policy.

2. Speech of the Foreign Affairs Minister at the Islamic summit which has certain views on the Middle East Policy.

Should you need specific answers to certain question , please contact the Ministry of Foreign Affairs, P.O. Box 1, Abu-Dhabi, UAE. Tel: 9712 652200, Fax: 9712 663926.

With kind regards.

Sincerely yours

F Sulf

F. Sultan
Resources Centre

written to
M-y F-A.
30/6/98

سفارة دولة الامارات العربية المتحدة - لندن
Embassy of the United Arab Emirates, 30 Princes Gate, London SW7 1PT
Tel: 0171 581 1281, Fax: 0171 581 9616
Consular & Commercial Section, Tel: 0171 589 3434, Telex: 918 459, Cables: Emarat, London SW7.

EMBASSY OF URUGUAY

London, 8 June 1998

No. 065/98

Ms. Caroline M. Jackson
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol BS8 1RJ

Dear Ms. Jackson,

Thank you for your letter dated 21 May 1998 requesting information on the status accorded to the Palestine Liberation Organisation by the Government of Uruguay.

Following consultations with the Uruguayan Foreign Ministry, I can confirm that the Uruguayan Government have not formally recognised the above-mentioned organisation or the so-called National Palestine Administration.

Notwithstanding, on the occasion of the inauguration of the new Palestine National Authority the then Uruguayan Foreign Minister sent Mr Yasser Arafat a note of congratulations. The Foreign Minister highlighted the "firm support" of our Government towards the Palestine authorities' efforts in order to secure the peace process in the Middle East. The expression "legitimate Palestine authorities" was also mentioned by him.

I sincerely hope that this information meets with your satisfaction.

Yours faithfully,

Agustin Espinosa-Lloveras
Ambassador

Embassy of Venezuela
London

SPM/ 308

20 August 1998

Ms. Caroline M. Jackson, LL.B.(Hons).LL.M
Department of Law
University of Bristol
Bristol.-

Dear Ms. Jackson,

Further to your letter dated 21st May 1998 in relation to the position of Venezuela regarding the Palestine Liberation Organisation (PLO), please be advised that the government of Venezuela is currently studying the formalisation of full diplomatic relations with the Organisation.

At the United Nations, Venezuela has repeatedly supported General Assembly resolutions regarding the status of the PLO as the sole legitimate representative of the Palestinian people and at present, the Embassy of Venezuela in Israel exercises diplomatic duties before the Palestine National Authority.

It has therefore been suggested that a simple normalisation of a de facto *situation take place, through a* de jure *recognition that would formalise the cordial relations that have traditionally prevailed between Venezuela and the Palestinian entity.*

Sincerely,

REPUBLICA DE VENEZUELA
EMBAJADA EN GRAN BRETAÑA

Jacqueline Mora-Vayer
Minister Counsellor
Chargé d'Affaires a.i.

LCG/IL/lcg

EMBASSY OF THE FEDERAL
REPUBLIC OF YUGOSLAVIA
5 Lexham Gardens, LONDON W8 5JJ
Tel: 0171 370 6105; Fax: 0171 370 3838

Ms Caroline Jackson, LL.B. (Hons), LL.M.
Department of Law
University of Bristol
Wills Memorial Building
Queens Road
Bristol, BS8 1RJ

11 August 1998

Dear Ms Caroline Jackson,

Further to your letter requesting information on the status accorded to the Palestine Liberation Organization (PLO) by the Government of the Federal Republic of Yugoslavia, I would like to advise you of the following:

1. The Social Alliance of the Working People of Yugoslavia (SSRNJ), as the most numerous political organization in the former SFR of Yugoslavia, established de facto relations with the PLO in 1964 when it was established. At that time PLO did not have an emphasized political character and it was focused in particular on the problem of Palestinian refugees. At the time when Yasser Arafat became its leader and assumed the post of its executive secretary in 1969, the PLO became more a political organization. As it is known, the PLO comprised at that time a number of Palestinian organizations and movements. Since then, political and State authorities of the SFR of Yugoslavia has recognized the PLO as the sole legitimate representative of the Palestinian people. However, that did not exclude relations of political organizations of that time ,i.e. parties, of the SFR of Yugoslavia (SSRNJ and Yugoslav Communist Party) with other members or non-members of the PLO, aimed at ensuring full protection of interests of the Palestinian people.

The first representative office of the PLO in Europe was opened in Belgrade in 1971.

On 15 November 1988 the Palestinian State was proclaimed by the Palestinian National Council at its 19th special meeting in Algeria from 12-15 November 1988. The SFR of Yugoslavia was the fifth country which recognized the Palestinian State. The next year, on 5 April 1989 diplomatic relations were established between the SFR of Yugoslavia and the Palestinian State. The representative office of the PLO in Belgrade got the status of the Embassy of the Palestinian State.

Hoping that the presented information will be useful for your research, I remain

Sincerely yours,

M. Paić

Milisav Paić
Minister Counsellor

Telephone: 0171 836 7755
Facsimile: 0171 379 1167
Telexes: 262014/262115

HIGH COMMISSION OF THE
REPUBLIC OF ZIMBABWE
ZIMBABWE HOUSE
429 STRAND
LONDON WC2R 0SA

Our Ref: ZLO/INF/8

5 June, 1998

Ms Caroline Jackson
University of Bristol
Department of Law
Wills Memorial Building
Queens Road
Bristol
BS8 1RJ

Dear Ms Jackson,

RE: THE STATUS ACCORDED TO THE PLO BY THE GOVERNMENT OF ZIMBABWE

Thank you for your letter dated 21 May, 1998.

The Government of Zimbabwe recognised the PLO in 1980. The PLO was recognised as a government in exile and was/and is represented in Zimbabwe at Ambassadorial level. Zimbabwe also regards the PLO as a legitimate representative of the Palestian people.

We apologise for the late response.

Yours faithfully

Georgina Kwesha
For: High Commissioner

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